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No. 94-

In The

Supreme Court of the United States

October Term, 1994

The Primate and Bishops' Synod of the Russian Orthodox Church Outside of Russia,

Petitioner,

v.

The Russian Orthodox Church of the Holy Resurrection, Inc., et al.,

Respondents.

Petition For A Writ Of Certiorari To The Supreme Judicial Court Of Massachusetts

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Religion Clause of the First Amendment and "neutral principles of law," *Jones v. Wolf*, 443 U.S. 595 (1979), prohibit state courts from awarding the property of an historically hierarchical church to a local congregation that unilaterally amends its bylaws to repeal its allegiance to the church in violation of the governing documents of the church.

2. Whether this Court's opinion in *Jones v. Wolf*, 443 U.S. 595 (1979), should be reversed, in view of the widespread confusion in the lower courts that make it difficult for a hierarchical church to maintain its polity, and that create a persistent bias in favor of congregational church polity.

LIST OF PARTIES

Pursuant to Supreme Court Rule 14.1 (b), the parties to this proceeding are:

Petitioner:

The Primate and Bishops' Synod of the Russian Orthodox Church Outside of Russia.

Respondents:

The Russian Orthodox Church of the Holy Resurrection, Inc.; Rev. Victor Melehov, Rector; Rev. Peter Farnsworth, deacon; and Gregory Melehov, Nina Marcinowski, Lydia Boyko, Peter Chaplain, Elizabeth Chisholm, Alexandra Logozinska, and Halena Michajlow, members of the parish council of the Russian Orthodox Church of the Holy Resurrection, Inc.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, the Primate and Bishops' Synod of the Russian Orthodox Church Outside of Russia, respectfully petitions this Court for a writ of certiorari to review the decision of the Supreme Judicial Court of Massachusetts in this case.

OPINIONS BELOW

The opinion of the Supreme Judicial Court of Massachusetts (Pet. App. 1a-3a) is reported at 418 Mass. 1001, 636 N.E. 2d 211 (1994). The opinion of the Appeals Court of Massachusetts (Pet. App. 4a-15a) is reported at 35 Mass. App. Ct. 194, 617 N.E.2d 1031 (1993). On August 1, 1991, the Massachusetts Superior Court for the County of Worcester issued findings, rulings, and an order (Pet. App. 16a-22a); the opinion of the trial court is unreported. The trial court issued a judgment on August 5, 1991 (Pet. App. 23a-24a).

JURISDICTION

The judgment of the Massachusetts Supreme Judicial Court was entered on July 6, 1994. On September 23, 1994, a timely application was presented to Justice David Souter as Circuit Justice for the United States Court of Appeals for the First Circuit, for an extension of time, up to November 18, 1994, to file this petition. Justice Souter granted the application on September 23, 1994. This Court has jurisdiction under 28 U.S.C. §1257.

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Religion Clause of the First Amendment to the United States Constitution, as applied to the several States through the Due Process Clause of the Fourteenth Amendment.

STATEMENT OF THE CASE

This case involves a church property dispute. No issue is raised over the freedom of the respondents – a local Russian Orthodox parish ("the parish"), its priest, deacon, and members of the parish council – to disaffiliate from the petitioner – the Bishops who govern the Russian Orthodox Church Outside of Russia ("the Church") or to join a different religious organization, the Holy Orthodox Church in North America. The sole issue before the Court is whether the local parish may hold on to the property after it disaffiliated from a national church whose religious convictions about the episcopal polity of the Church are clearly reflected in the governing documents of the Church. The petitioner brought this issue to the courts of Massachusetts because of the decision of the parish to leave the Church and to seize local parish property.

Holy Resurrection parish was established in 1952 under the *Regulations of the Russian Orthodox Church Outside of Russia* ("Regulations") and the *Normal Parish By-Laws* ("By-Laws"), both of which are in the record. Relevant portions of these church documents are included in the Appendix. Pet. App. 25a-44a. The hierarchical structure of the Church is easily recognizable in the *Regulations*, which set forth the duties and powers corresponding to each governing body of the Church. For example, the *Regulations* provide that "[a]ll organs of the Church administration, beginning with the First Hierarch and Synod of Bishops and others in descending order, must subject their acts to scrutiny and control, according to the prescribed chain of authority." *Regulations* ¶ 6. Pet. App. 26a. The *Regulations* also provide for internal hierarchical judicatories. There are three levels of courts within the Church. There is a Diocesan Court, presided

over by the bishop; its decisions are valid only when approved by the bishop (¶¶ 45 and 47, §13). Pet. App. 32a-34a. The Synod hears appeals from diocesan decisions (¶ 29, §6). The Court of last instance is the Council of Bishops (¶ 11, §3). Pet. App. 27a.

The *Regulations* should be read together with the *By-Laws*, which specifically address the way in which the hierarchical structure of the Church affects the ultimate control of real estate occupied by a local parish: "sale of church real estate, its alienation, exchange or cession for building purposes, shall be effected subject to the authorization of the Bishops' Synod." *By-Laws* ¶ 47. Pet. App. 43a-44a. Additionally, upon the closing of the parish the "entire personal and real estate [property] of the parish shall be turned over to the direct management and disposition of the diocesan authorities as per the direction of the Ruling Bishop." *By-Laws* ¶ 56. Pet. App. 44a. The *By-Laws* can only be changed with "the approval of the Diocesan Bishop, and on condition that such amendment in the By-Laws be ratified by the Bishops' Synod." *By-Laws* ¶ 54. Pet. App. 44a. The parish never submitted its proposed changes in the *By-Laws* to the Synod. Respondent Melehov, the rector of the parish, admitted at trial that the purported amendment of the *By-Laws* violated this restriction. App. Ct. Rec. 99-102.

The authority of parishes in the Church is severely limited. Article 20 of the *By-Laws* provides that "Canonical matters as well as jurisdictional matters ([Articles] 1-10) shall not be within the competency of either the Annual or Extraordinary parish meetings." Pet. App. 41a. The parish in this case attempted a jurisdictional change when it decided that one group of bishops was more religiously congenial than another. The parish does not have the authority to select its own bishop, appoint its own clergy, change its own boundaries, or change its

religious affiliation. These canonical and jurisdictional matters, set forth in Articles 1 through 10, are completely outside the competence of the parish. The *By-Laws* also provide that clergy are appointed only by the diocesan bishop. *By-Laws* ¶¶ 4, 8 and 10. Pet. App. 37a-38a. It is undisputed that Melehov (and all predecessor clergy) were appointed by diocesan bishops. Melehov took an oath of obedience to the Church. App. Ct. Rec. 71, 73-74.

The underlying religious dispute in this case arose when the judicial procedure of the Church was set in motion for a confidential disciplinary proceeding against a clergyman not a party to this case, Archimandrite Panteleimon. Melehov Deposition 23-30. Believing that the disciplinary proceeding would be pursued unfairly, Fr. Melehov, together with other clergy, left the Church *prior to* the disciplinary proceedings against Panteleimon. Melehov and other clergy also claimed that the petitioner was "inclining towards ecumenism" by "having services with members of other faiths" and by contacts with religious counterparts in the Russian Orthodox Church who are subject to the jurisdiction of the Patriarch of Moscow. Pet. App. 10a, n. 5; App. Ct. Rec. 66-70, 80-81. In Fr. Melehov's words, he reached a point where he felt he "could no longer follow the directions of [his] superiors." App. Ct. Rec. 71. Ignoring the procedure for the internal review of grievances by the Synod of Bishops called for in the Church's organic documents, App. Ct. Rec. 311, Melehov led an effort to sever the ties binding the parish to the Church.

On January 3, 1987, Metropolitan Vitaly, who was Melehov's Bishop and who also serves as the Primate of the Church, sent a telegram to Melehov specifically directing him not to go forward with a special meeting of the parish that Melehov had called for the purpose of

leaving the Church. App. Ct. Rec. 74-75. On the following evening Melehov defied the Metropolitan's orders and convened the members of the parish in an extraordinary meeting to amend their articles of organization and By-Laws so as to remove all references to the Church. The Metropolitan sent two representatives to this meeting to warn the parishioners that their meeting was canonically irregular, that "the Diocese has prohibited the . . . illegal meeting," App. Ct. Rec. 104. Melehov called the police to have them ejected from the meeting. App. Ct. Rec. 105-106, 112. Melehov also excluded two members of the parish from the voting, despite their offer to pay their annual dues.[1] App. Ct. Rec. 106-112, 149-150. The members of the parish then voted by a bare two-thirds majority to amend the By-Laws so as to disaffiliate with the Church.[2] Metropolitan Vitaly later suspended Melehov from his priestly duties within the Church. App. Ct. Rec. 118-119.

A. Proceedings in the Superior Court of Massachusetts

The Church brought this action in the Superior Court of Massachusetts for Worcester County, seeking a declaration that the vote at the extraordinary parish meeting of

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[1] The significance of this exclusion is that if these two members had voted to remain within the Church, the vote to amend the by-laws would have fallen short of the required two-thirds majority. The Appeals Court ruled that these two persons were properly excluded because of evidence that they had not paid their dues for twelve months. Pet. App. 13a.

[2] What the courts below overlooked is that the canon law of the Church does not authorize the property claim to be settled by a democratic vote at the parish level, but only by the full vote of the Synod of Bishops. *By-Laws* ¶ 54. Pet. App. 44a.

January 4 was illegal and that the real and personal property of the parish is subject to the dominion and control of the Church. After a two-day bench trial, the Superior Court entered judgment for the local parish. Citing an earlier decision involving a church that, unlike the Church, had freely chosen to structure itself both as a hierarchical church and as a congregational church, *Antioch Temple, Inc. v. Parekh*, 383 Mass. 854, 422 N.E.2d 1337 (1981), the trial judge ruled that although the Church and the parish were hierarchical in matters of faith and polity, the parish was congregational in terms of property ownership. Pet. App. 20a. The trial court also ruled that the vote to amend the by-laws was legal and proper, that the amendment of the articles of organization and the withdrawal of the respondent parish from the petitioner Church was legal and proper; and that the respondent parish is the sole owner of all its assets. Pet. App. 21a-22a. Despite the church documents cited above, the trial court entered a finding that the property occupied by the Holy Resurrection parish was never "diocesan, monastic or church [national] property." Pet. App. 19a.

B. Proceedings in the Appeals Court of Massachusetts

Despite its candid acknowledgement that "the Church documents provide considerable force to the Church's position," Pet. App. 8a, the Appeals Court affirmed. Among the matters that the Appeals Court conceded were within the jurisdiction of the Synod, according to the Regulations of the Church, are "matters concerning church property in dioceses [and] parishes . . . coming within the jurisdiction of [the] Synod." Pet. App. 8a. The Appeals Court also pointed to another Regulation that states:

> [The] diocesan bishop, having the overall care of his diocese and its prosperity . . . [among other matters] administers and disposes of diocesan and monastic property and supervises all other church property in the diocese, in accordance with the 41st Apostolic canon: 'We command that the Bishop have authority over the property of the church'. . . . Pet. App. 8a.

The Appeals Court also found that:

> the parish by-laws also lend support to the Church's contention that the Church had control over the parish's property. At the time of the parish's organization, it adopted the "normal" by-laws of the Church. While providing that the management of church and parish property is vested in the parish council, the "sale of church real estate, its alienation, exchange or cession for building purposes, shall be effected subject to the authorization of the . . . Synod." Parish property of every kind, on the other hand, may be sold, leased and ceded for building purposes by decision of the parish. Closing of the parish must be voted by two-thirds of its members, and upon closing, "the entire personal and real estate of the parish shall be turned over to the direct management and disposition of the diocesan authorities . . . . " Pet. App. 8a-9a.

In spite of this showing on the record, the Appeals Court affirmed, in part because of evidence of movement out of the Church by individual parishes without a claim by the Church in civil courts. Pet. App. 10a-11a. The appellate court affirmed the ruling of the trial court that the Church was congregational – at least as far as the control and use of its property was concerned – on the

ground that this finding was not "clearly erroneous."[3] Pet. App. 11a.

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[3] The characterization of an Orthodox Church as a combination of episcopal and congregational polities is, at the very least, a delicate blend of fact and law that merited closer scrutiny of the record than the appellate courts below gave it. In both appellate courts, however, the findings of the trial court were affirmed on a standard that only searched for clear error in the opinion of the trial court. These appellate courts ignored the direction of this Court in *Bose Corp. v. Consumers Union*, 466 U.S. 485 (1984), that "in cases raising First Amendment issues . . . an appellate court has an obligation to 'make an independent examination of the whole record' in order to make sure that 'the judgment does not constitute a forbidden intrusion' " in an area protected by the First Amendment. *Id.* at 499, citing *New York Times v. Sullivan*, 376 U.S. 254, 284-286 (1964). If the appellate courts below had undertaken the independent review of the entire record that is called for under *Bose*, they would have discovered that all parishes leaving the Church were subject to disciplinary Church proceedings and that there were ample reasons for the Church to pursue the respondents (and not some of the other parishes) in court as well. The parish's attack on episcopal authority in the Church – that it was not relied upon in all instances – is about as cogent as the defense offered by the driver of a speeding black Mercedes to a traffic officer that he should have stopped a faster red Porsche. As the record in this case illustrates, this line of attack is not a reliable guide for interpretation of the polity of the petitioner by a secular tribunal. In any event, as this Court taught in *Thomas v. Review Board of the Indiana Employment Security Division*, 450 U.S. 707 (1981), "religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection. . . . " *Id.* at 714 (1981). The full record, moreover, discloses that the respondents were bound to the Church under by-laws that were different from those governing some of the other parishes and that many of the parishes had no property whatsoever. It was for these reasons that the Church – upon the advice of counsel – addressed the respondents' appropriation of property from the Church before the civil authorities as well as in disciplinary proceedings. App. Ct. Rec. 308.

C. Proceedings in the Supreme Judicial Court of Massachusetts

The Church sought further review in the Supreme Judicial Court of Massachusetts, which also affirmed the judgment of the Superior Court on the view that the trial judge's findings of fact were not "clearly erroneous." Pet. App. 2a. In a brief opinion the Supreme Judicial Court adopted without significant change or comment "the reasons stated in the opinion of the Appeals Court." Pet. App. 3a.

REASONS FOR GRANTING THE PETITION

The questions presented in this petition afford the Court an opportunity to clarify its teaching about the significant limits that the First Amendment places on the power of secular tribunals to resolve intra-church disputes. Both questions assess the impact of the "neutral principles of law" approach articulated in *Jones v. Wolf*, 443 U.S. 595 (1979). The first question probes whether the result in several cases like this one, in which state courts have awarded the property of an historically hierarchical church to a local congregation, is prohibited under the teaching of this Court in *Jones v. Wolf*. The second question probes whether, in view of the widespread confusion in the lower courts in this area of the law that makes it difficult for a hierarchical church to maintain its polity, and that creates a persistent bias in favor of congregational church polity, the Court should now reverse its opinion in *Jones v. Wolf*.

For over a century – from *Watson v. Jones*, 80 U.S. 679 (1871) to *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976) – the teaching of this Court was clear and easy to follow. For example, in *Watson* the Court clarified that there are two basic kinds of polity or forms

of church governance, congregational polity and hierarchical polity. As to hierarchical churches, the Court taught in *Watson*: "[W]henever the questions of discipline or of faith or ecclesiastical rule, custom or law have been decided by the highest of these church judicatories to which the matter has been carried, the legal tribunals must accept such decisions as final, and as binding on them. . . . It is of the essence of these religious unions, and of their right to establish tribunals for the decision of questions arising among themselves, that those decisions should be binding in all cases of ecclesiastical cognizance, subject only to such appeals as the organism itself provides for." *Watson*, 80 U.S. at 727, 729.

At the height of the Cold War this Court clarified repeatedly that the Russian Orthodox Church was entitled to possession of its church property irrespective of the wishes of the New York legislature to wrest the property from the leaders of the church in Moscow – on the ground that the Patriarch of Moscow was dominated by the Communists – and give it to an American faction opposed to the Patriarch. In *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94 (1952) the Court defended "a spirit of freedom for religious organizations, an independence from secular control or manipulation, in short, power to decide for themselves, free from state interference, matters of *church government* as well as those of faith and doctrine." *Id.* at 116 (emphasis supplied). In *Kreshik v. St. Nicholas Cathedral*, 363 U.S. 190 (1960), this Court summarily reversed, teaching that the judiciary may not violate the First Amendment on the matter of transfers of church property any more than the legislature can.

In *Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440 (1968) the Court clarified that "civil courts [have] *no* role in determining ecclesiastical questions in the process

of resolving property disputes. . . . The First Amendment severely circumscribes the role that civil courts may play in resolving church property disputes. . . . First Amendment values are plainly jeopardized when church property litigation is made to turn on the resolution by civil courts of controversies over religious doctrine and practice." *Blue Hull*, 393 U.S. at 447, 449.

Milivojevich reaffirmed the teaching of *Blue Hull*: "Consistently with the First and Fourteenth Amendments '[c]ivil courts do not inquire whether the relevant [hierarchial] church governing body has power under religious law . . . [to decide such disputes]. . . . Such a determination . . . frequently necessitates the interpretation of ambiguous religious law and usage. To permit civil courts to probe deeply enough into the allocation of power within a [hierarchial] church so as to decide . . . religious law . . . [governing church polity] . . . would violate the First Amendment in much the same manner as civil determination of religious doctrine.' " *Milivojevich*, 426 U.S. at 708-09 *quoting Maryland and Virginia Churches v. Sharpsburg Church*, 396 U.S. 367 (1970). The *Milivojevich* court also clarified that "where resolution of [intra-church] disputes cannot be made without extensive inquiry by civil courts into religious law and polity, the First and Fourteenth Amendments mandate that civil courts shall not disturb the decision of the highest ecclesiastical tribunal within a church of hierarchial polity, but must accept such decisions as binding on them, in their application to the religious issues of doctrine or *polity* before them." *Milivojevich*, 426 U.S. at 709 (emphasis added).

These cases offered the lower courts clear practical guidance. First, the courts should decide whether the church is congregational or hierarchical. Once a determination had been made that a church is hierarchical, the

courts should defer to the decisions of the highest ruling body of the church.

In 1979, however, the Court suggested that although state courts were *allowed* to defer to the decisions of national church judicatories in the case of hierarchical churches, they were no longer *required* to follow the standard of deference to the self-understanding of these religious communities. In *Jones v. Wolf*, 443 U.S. 595 (1979), the Court announced that state courts could resort to "neutral principles of law" to resolve intra-church disputes. Both the majority and the dissent in *Jones v. Wolf* were in complete agreement that secular courts have no business whatever imposing their own views as to competing theological views about the form of church governance. *See, e.g.*, at 610-614, 443 U.S. at 604-606; and at 610-14, 616-18 (Powell, J., dissenting). The only issue in *Jones* was whether the *Watson*-style of deference was the only secure method of achieving this result, or whether – as the Court held – the "neutral principles of law" approach would achieve the same result of nonentanglement by the government in religious matters more effectively than the approach the Court had followed since *Watson*.

A. The State Courts are in Deep Disarray over the Resolution of Intra-church Property Disputes

The hope that the Court expressed in *Jones v. Wolf* for the new method of resolving intra-church disputes under "neutral principles of law" has regrettably proved illusory. Instead of cleaner, easier, and more predictable results in this area of the law, the current state of affairs is one of chaos and confusion in the lower courts.

The mischaracterization of the polity of the Orthodox Church in this case as a hybrid blend of hierarchical and congregational governance constitutes an independent reason for granting the writ. All the precedents of this

Court involving Eastern Orthodox Churches assume correctly that the polity of these religious organizations is hierarchical. *See, e.g., Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in North America*, 344 U.S. 94 (1952); *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976). The judgment below sharply conflicts with applicable decisions of this Court on the same federal question. Supreme Court Rule 10.1(c).

More significantly, the judgment below conflicts with decisions of many other state courts of last resort. Supreme Court Rule 10.1(b). State courts are now in deep disarray over the resolution of intra-church property disputes. Some courts have followed this Court's unambiguous teaching in *Watson v. Jones*, 80 U.S. 679 (1871) that deference to the binding decisions of hierarchical churches is required by the First Amendment. *See, e.g., Fonken v. Community Church*, 339 N.W. 2d 810 (Iowa 1983); *Original Glorious Church of God in Christ, Inc. of the Apostolic Faith v. Myers*, 179 W.Va. 255, 367 S.E. 2d 30 (1988); and *Protestant Episcopal Church v. Graves*, 83 N.J. 572, 417 A.2d 19, *cert. denied*, 449 U.S. 1131 (1981).

Other courts, including the Supreme Judicial Court of Massachusetts in this case, have gone so far as to impose their own view of congregational organizational structure upon manifestly hierarchical communities such as the Presbyterians and the Episcopalians.[4] In this case, the

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[4] We do not offer any extended discussion of the treatment of Roman Catholic polity in secular tribunals after *Jones v. Wolf* since that Church has not suffered a significant transformation of its episcopal authority at the hands of secular courts, at least upon appellate review. *See, e.g., Fortin v. Roman Catholic Bishop of Worcester*, 416 Mass. 781, 625 N.E. 2d 1352, *cert. denied*, 114 S.Ct. 2164 (1994); *Grutka v. Clifford*, 445 N.E.2d 1015 (Ind. App.), *cert. denied*, 465 U.S. 1006 (1984) (reversing decision that local pastor, not the Bishop, controlled church cemetery); *Struemph v.*

principal error of the lower courts was to rely upon an earlier decision involving a church that, unlike the petitioner, had freely chosen to structure itself both as a hierarchical church and as a congregational church, *Antioch Temple, Inc. v. Parekh*, 383 Mass. 854, 422 N.E.2d 1337 (1981).[5] The state courts in this case ruled that although the Church and the parish were hierarchical in matters of faith and polity, the parish was congregational in terms of property ownership. Pet. App. 20a.

McAuliffe, 661 S.W. 2d 559 (Mo. App. 1983) (reversing injunction against Bishop and pastor that ordered them not to rearrange altars in parish without the consent of the laity); *Parent v. Roman Catholic Bishop of Portland*, 436 A. 2d 888 (Me. 1981) (employing "neutral principles of law" to conclude that Bishop, not local parish, had unrestricted title to church property); *Galich v. Catholic Bishop of Chicago*, 75 Ill.App. 3d 538, 394 N.E. 2d 572 (1979), *cert. denied*, 445 U.S. 916 (1980). Perhaps these results involving Roman Catholics are due to the enactment of State statutes allowing the formation of a "corporation sole," a device under which all the property of a Roman Catholic diocese is held in the name of the local Bishop or Archbishop. *See, e.g.*, Calif. Corp. Code §10002; §225 Ill. Rev. Stat. ch. 32, ¶ 164 (1970). *Jones v. Wolf* expressly allows state courts to take into account state statutes that may determine the outcome of an intra-church property dispute. 443 U.S. at 603. We do not mean to suggest that the Roman Catholic Church is the only religious community to take advantage of the corporation sole statutes that exist in most states. For example, The Church of Jesus Christ, Latter-Day Saints is organized under the Utah statute, Utah Code Ann., §16-7-1 (1953); *see Corporation of Presiding Bishop v. Amos*, 487 U.S. 327, 330 n. 3 (1987).

[5] We do not maintain that the categories of congregational and hierarchical polity are hermetically sealed and can never overlap. We only insist that these distinct categories should not be confused or imposed upon a religious community like the Russian Orthodox Church Outside of Russia, which has manifestly chosen not to blend them in its own polity.

This decision directly conflicts with decisions of other state courts of last resort on the same federal question. For example, this case is in apparent conflict with *Draskovich v. Pasalich*, 151 Ind. App. 397, 280 N.E. 2d 69 (1972) (Serbian Eastern Orthodox Church is hierarchical when dispute with local parish is analyzed according to church documents). *Draskovich*, in turn, apparently conflicts with *Piletich v. Deretich*, 328 N.W. 2d 696 (Minn. 1983) (Serbian Eastern Orthodox Church is *not* hierarchical with respect to resolution of intra-church disputes over local property when dispute is analyzed according to "neutral principles of law"). This conflict illustrates that different results obtain with respect to the *same* church when different judicial criteria are employed in resolving intra-church disputes. *Draskovich* was decided with an eye cocked to *Watson v. Jones, supra*, and *Piletich* was decided after *Jones v. Wolf*, 443 U.S. 595 (1979). Although *Piletich* might seem to be harmonious with this case, it is actually in conflict because the crucial factor on which the Minnesota Supreme Court relied in *Piletich* – a provision in the Church constitution that gave property rights to the local parish – is absent in the record of this case. See Statement of the Case, *supra*, at 2-3, 5 n.2, 7.

The rulings in this case and in others that we discuss below constitute a serious constitutional violation that does grave injustice to hierarchically governed religious communities. As we suggested above with respect to the Serbian Eastern Orthodox Church, so significant is the conflict among the several state courts that the same religious community cannot now rely on a uniform national rule that will respect their polity or form of governance. We offer two other examples of conflict of this sort corresponding to the two forms of church governance that may be called hierarchical, presbyterial polity and episcopal polity.

Before *Jones v. Wolf*, 443 U.S. 595 (1979),[6] Presbyterians used to be able to rely on the precedents of this Court, notably *Watson* itself[7] and *Blue Hull*[8], in the resolution of

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[6] *Jones v. Wolf* involved a dispute among two Georgia congregations of the Presbyterian Church in the United States over doctrinal matters, including the ordination of women.

[7] *Watson* involved a dispute over whether the slave-holding faction or the abolitionist faction of the Walnut Street Presbyterian Church of Louisville, Kentucky was entitled to ownership of the church. This Court ruled in favor of the abolitionists because of the clear evidence that the Presbyterian Church is a hierarchical organization and that the General Assembly of the Presbyterian Church in the U.S.A. had ruled definitively that persons who believed in slavery could not be received as church members until they agreed "to repent and forsake [this] sin." So severe was the conflict among Presbyterians in the nineteenth century over the morality of slavery that they formed two distinct organizations reflecting their different conclusions on this issue. That split into the United Presbyterian Church in the United States of America (Northern or abolitionist) and the Presbyterian Church in the United States (Southern or pro-slavery) lasted until the two groups merged in 1983 to form the Presbyterian Church (U.S.A.).

[8] *Blue Hull* involved a dispute that is similar in some respects to the instant case. Two Georgia congregations of the Presbyterian Church in the United States decided to leave PCUS because, like the respondents here, they contended that the General Assembly of PCUS had departed from doctrine by maintaining open membership in the ecumenical organization known as the National Council of Churches of Christ in the U.S.A. Also like the respondents here, the local congregations in *Blue Hull* maintained that they were entitled to keep the church property after the break with the general Church. As here, the state court ruled in favor of the local congregations, but this Court reversed that decision and clarified that state courts may not make church property disputes turn on whether a general church "abandoned or departed from the tenets of faith and practice it held at the time the local churches affiliated with it." 393 U.S. 440, 441 (1969).

disputes among its members. After *Jones v. Wolf* Presbyterians have cause to fear that the denominational polity that, as followers of John Calvin, they regard as divinely mandated[9] may be tampered with by a secular civil tribunal. Thus a "large and influential body," *Watson*, 80 U.S. at 729, which today we would call a major mainline church, can no longer rely on this Court's precedents for an even-handed understanding of its polity by the state courts. For example, in *Presbytery of Beaver-Butler of United Presbyterian Church v. Middlesex Presbyterian Church*, 507 Pa. 255, 489 A.2d 1317, *cert. denied*, 474 U.S. 887 (1985), the Pennsylvania Supreme Court ruled for a local congregation of the United Presbyterian Church after an investigation of the deed, relegating the Church's Book of Order to "spiritual matters." *See also Presbytery of Elijah Parish Lovejoy v. Jaeggi*, 682 S.W. 2d 465 (Mo. 1984) (ruling for local parish of the United Presbyterian Church on the basis of an extensive examination of the history of the deed, ignoring the form of Presbyterian polity); *and see York v. First Presbyterian Church of Anna*, 130 Ill.App. 3d 611, 474 N.E. 2d 716 (1984), *cert. denied*, 474 U.S. 865 (1985) (accord).

By stark contrast, the Maryland Court of Appeals applied the "neutral principles of law" approach to reach the conclusion that in the event of a secession of a local parish from the United Presbyterian Church, the property should be awarded to the presbytery, not the local parish. *Babcock Memorial v. Presbytery of Baltimore*, 464 A. 2d 1008 (Md. 1983). *See also Calvary Presbyterian Church v. Presbytery of Lake Huron*, 148 Mich. App. 105, 384 N.W. 2d 92 (1986) (accord).

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[9] *See, e.g.*, John Calvin, *The Institutes of Christian Religion* Book IV, chapters III-IV (1536), reprinted in John T. McNeill ed., *Calvin: Institutes of Christian Religion* 1053-1084 (1960).

Similarly, The Protestant Episcopal Church in the United States of America[10] (PECUSA or "the Episcopal Church") can no longer rely on a uniform approach among the States to an appreciation that it is an *episcopal*, not a congregational church. For example, in *Bjorkman v. Protestant Episcopal Church in the United States of America*, 759 S.W. 2d 583 (Ky. 1988), the Supreme Court of Kentucky affirmed a judgment in favor of a local parish seeking to split off from the Episcopal Church to join the Anglican Catholic Church despite clear evidence in the record that: (1) the canon law of the church prohibits the encumbrance or alienation of any consecrated church or chapel[11] without the consent of the bishop of the diocese, 759 S.W. 2d at 586; (2) the 1899 articles of incorporation "plainly show a corporate purpose to be affiliated with, and to be subject to, the canons of the Diocese of Lexington," 759 S.W. 2d at 587, and (3) in the 1907 Instrument of Donation, "the governing body of [the local parish] imposed conditions constituting a constructive trust in favor of the national church on the use of its church property." *Id.*

Reflecting an apparent bias in favor of congregationalism, the Kentucky Supreme Court suggested that

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[10] The official designation of Episcopalians was intended after the events of 1776 not to signal a complete rupture of the spiritual communion with the Church of England, but to mark the distinct identity of *American* Episcopalians who were formerly known simply as "Anglicans."

[11] At perhaps the nadir of the degree to which state courts have fallen since *Jones v. Wolf*, the Kentucky Supreme Court actually suggested that the 1907 Instrument of Donation "applies only to the church building and does not apply to the real estate." 759 S.W. 2d at 586. That's a bit like a divorce court giving the homestead to the wife and the lot to the husband and leaving it to the parties to figure out what to do next.

the local parish "acquired the property with no assistance from PECUSA; that the property was managed and maintained exclusively by [the local parish]" and then added the remarkable conclusion that "PECUSA's relationship with [the local parish] was exclusively ecclesiastical and [the local parish] was at all times in control of its temporal affairs." 759 S.W. 2d at 587. This conclusion overlooked evidence in the record of that case that the local parish "enjoyed the benefits of membership in PECUSA for many long years – its members were confirmed by the Bishop of Lexington, its clergy participated in a PECUSA pension plan, PECUSA insured the church, and the church regularly asked for and received help and advice from the Bishop of Lexington." 759 S.W. 2d at 588 (Stephens, C.J., dissenting). The bifurcation of the relationship between the Episcopal Church and one of its parishes into matters temporal and matters spiritual resonates better in the English House of Lords, and completely misunderstands Episcopal ecclesiology. Leaving to one side the court's total misunderstanding of Episcopal polity,[12] however, the court's ruling betrays an utterly

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[12] This misunderstanding can be overlooked because judges in our Republic are not supposed to be gifted at theology. *Thomas v. Review Board of the Indiana Employment Security Division*, 450 U.S. 707, 716 (1981) ("Courts are not arbiters of scriptural interpretation."). But that doesn't mean that judges are supposed to impose their misunderstanding on religious communities. To the contrary, it means that they are supposed to leave them alone, allowing them to thrive or wither according to the strength of their teachings, without any assistance from the government. As this Court taught in *Thomas*: "The determination of what is a religious belief or practice is more often than not a difficult and delicate task. . . . However, the resolution of that question is not to turn upon a judicial perception of the particular belief or practice in question. . . . " *Id.* at 714.

naive understanding of how connectional churches actually function and a willingness to ignore clear evidence in the record that flies in the face of the conclusion that the court reached in *Bjorkman*. One is left with the distinct impression that the verdict came first – based on the judges's familiarity with congregationalism or perhaps on an unconscious preference for congregationalism – and that when the evidence was examined afterwards, only the bits of the record that could be fit into the verdict were attended to. Church property dispute cases are laden with problems of interpretation that are exacerbated when judges view facts with blinders on. *See Corporation of Presiding Bishop v. Amos*, 487 U.S. 327 (1987).

With cases such as *Bjorkman* on the books, it is small comfort to the Episcopal Church that other courts are directly in conflict with the Kentucky court (and with the Massachusetts Supreme Judicial Court in this case), on the issue of whether Episcopalians (and the Russian Orthodox in this case) are governed by *episkopoi* or bishops.[13] For example, in *Bennison v. Sharp*, 329 N.W. 2d 466 (Mich. App. 1983), an intermediate state court in Michigan examined the same church documents at issue in *Bjorkman* and held on virtually identical facts that the Episcopal Church is hierarchical with regard to property as well as spiritual matters. The *Bennison* court ruled that, absent an express trust in favor of the seceding majority faction of a local parish, which formed a new and distinct

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[13] The state of the law is now in such disarray that the same court is not consistent on how to view a hierarchical church. Contrast *Bjorkman v. Protestant Episcopal Church in the United States of America*, 759 S.W. 2d 583 (Ky. 1988) (Episcopalians are not entitled to deference as a hierarchical church) with *Cumberland Presbytery v. Branstetter*, 824 S.W. 2d 417 (Ky. 1992) (Presbyterians are entitled to deference as a hierarchical church).

religious organization, the seceding group was not entitled to the use of the church property.

The New Jersey Supreme Court also ruled in favor of the Episcopal Church in another instance in which a local Episcopal parish attempted to sever its ties with the national body. *Protestant Episcopal Church v. Graves*, 83 N.J. 572, 417 A.2d 19, *cert. denied*, 449 U.S. 1131 (1981). The *Graves* court undertook a *Watson*-type analysis that concluded in favor of the Episcopal Church. But it also undertook an analysis of "neutral principles of law" which led to the same conclusion. The court noted that although the deed of property ran to the local parish without any language of an express trust in favor of the Episcopal Church or any reverter clause to the Church, the constitution and canons of the Episcopal Church required Diocesan approval of the sale of a parish church. Accordingly, it ruled that the Episcopal Church and not the local parish was entitled to the property in dispute. *See also Bishop and Diocese of Colorado v. Mote*, 716 P. 2d 85 (Colo. 1986) (accord; rejecting *Watson*-type analysis and relying exclusively on "neutral principles of law"); *Rector, Wardens, and Vestrymen v. Episcopal Church*, 224 Conn. 797, 620 A. 2d 1280 (1983) (accord; relying more on *Watson*-type analysis); and *Tea v. Protestant Episcopal Church*, 96 Nev. 399, 610 P. 2d 182 (1980) (accord; relying on *Watson*).

The result in *Bjorkman* would have been unthinkable under *Watson v. Jones*, but has now become reality under *Jones v. Wolf*. The results in *Bennison, Graves, Mote, Rector*, and *Tea* would have been obvious under *Watson v. Jones*; they have now become clouded and dubious under *Jones v. Wolf*. In the current state of affairs, the Episcopal Church cannot now trust that a uniform national rule will acknowledge that Episcopalians are episcopally governed.

It must be candidly stated that the principal reason for the confusion in the state courts illustrated above arises from the tension within this Court's jurisprudence on this matter. For over a century – from *Watson v. Jones*, 80 U.S. 679 (1871) to *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976) – the teaching of this Court was clear and easy to follow. Since *Jones v. Wolf*, however, the results in the lower courts have been confusing, to say the least. The manner in which several state courts have followed the "neutral principles of law" approach suggested in *Jones v. Wolf* has been anything but smooth. As we have illustrated above, in some instances, state courts have in fact deferred to the highest adjudicatory of a hierarchical church. But in many other instances, including this case, state courts have virtually ignored the relevant evidence concerning the organizational structure of religious communities that are governed either with presbyterial or episcopal authority, and have imposed a congregational polity upon these organizations. Thus there is now a glaring conflict in the way in which state courts have understood this Court's direction concerning the use of "neutral principles of law" in resolving intra-church disputes properly before them.[14]

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[14] From *Watson v. Jones*, 80 U.S. 679 (1871), to *Jones v. Wolf*, 443 U.S. 595 (1979), this Court has taught clearly that some disputes among members of religious communities are beyond the power of secular civil tribunals to resolve. Thus in this case, petitioner does not want this Court or any other court to pronounce on the virtues or vices of ecumenism, on the prudence or folly of ecclesiastical perestroika, but simply to leave these questions for the members of Russian Orthodox Church Outside of Russia to resolve within the tribunals that the Church has established for this purpose. *See Watson*, 80 U.S. at 729 (secular tribunals are bound by decisions of church authorities on religious matters); *and see generally* Douglas Laycock, Towards a General Theory of the Religion Clauses: The Case of Church

B. The Conflict among the State Courts Has Created an Impermissible Governmental Preference for Congregational Polity over All Other Forms of Church Governance

The widespread conflict that we have illustrated in this petition over the application of "neutral principles of law" to intra-church disputes is no longer a minor issue that can be tolerated in our Republic, or one that needs to ripen further before resolution by this Court. This conflict now constitutes a grave constitutional violation that cuts to the very heart of the limit on governmental power expressed in the Religion Clause. Hence the Court should grant the writ because this case serves as an apt vehicle for reversing *Jones v. Wolf*.

After a decade and a half of the application of the new standard for adjudicating intra-church disputes allowed by *Jones v. Wolf*, it has become apparent that state courts have frequently distorted the self-understanding of religious communities involved in property disputes. Some of these cases are rightly decided; others are not. The ones that are wrongly decided run, moreover, only in one direction. They are systematically biased in favor of congregational polity. When courts are left free to ignore the clear teaching of *Watson* and its progeny, Baptists remain Baptists. For the purpose of determining property ownership, if not literally for *all* practical purposes, however, Presbyterians and Episcopalians have been transformed into quasi-Baptists by judicial fiat.[15] Thus the

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Labor Relations and the Right to Church Autonomy, 81 Colum. L. Rev. 1373 (1981).

[15] It is no answer to say that Presbyterians still get to believe in the teachings of John Calvin on church doctrine because the doctrine of the church and how it is to be governed

"neutral principles of law" approach has provided only an illusion or pretense of neutrality.[16] The actual effect of the operation of this standard since 1979 has been a tilt or a preference, however subtle, in favor of one particular form of church government, congregational or local control over all decisions affecting the life and well-being of a religious community. That preference may comport with basic assumptions in the culture about the value and vitality of democracy.[17] But those assumptions are

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is itself part of the religious expression of faith that the First Amendment protects against governmental interference. The same is true of the ecclesiology of the Orthodox, the Episcopalians, or of any other hierarchically structured religious organization.

[16] *See* Douglas Laycock, Formal, Substantive, and Disaggregated Neutrality Toward Religion, 39 DePaul L. Rev. 993 (1990).

[17] Even when we maintain space for third parties and other local organizations in American politics, the dominant model to maintain national unity has been through the discipline of a political party. Thus if a serious dispute were to arise between the Democratic National Committee and a local ward politician from Cook County over credentials to a national convention, the federal courts would defer to the party rules in the resolution of the conflict. The local politician would, of course, be free to disassociate from the party, but that exercise of free speech would under no circumstance entail a right to take even a portion of party funds with him or her to start up a rival political organization. As applied to the facts of this case, this principle means that religious dissidents are free to leave any religious community for any reason or for no reason. But that does not mean that they may take the assets of the community with them, especially if the community has for centuries been governed in a manner that requires more than the express "consent of the governed" in matters of spiritual discipline. It is for this very reason that secular courts have since *Watson v. Jones*, 80 U.S. 679 (1871), consistently taught that membership in a religious community entails *implied assent* to its teachings. *Id.* at 729.

completely misplaced when applied by the government to a religious community.

And as this case illustrates, despite the clarity of *Kedroff v. St. Nicholas Cathedral*, Russian Orthodox Christians can also be effectively transformed into Baptists or Congregationalists by a state court. Thus the petitioner is before this Court not simply to protect its vital interest in the property of its community, but more importantly, to defend its inalienable right to believe the doctrines that underlie the structure of its faith around episcopal authority.[18]

The "neutral principles of law" approach has presented formidable challenges to hierarchically governed religious communities. Among the practical difficulties this method entails for churches are at least four false assumptions: (1) that any church can anticipate ahead of time every possible ambiguity that might arise in the

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[18] As a historical and religious matter, the hierarchical structure of an episcopally governed church like the Russian Orthodox Church Outside of Russia originates with Jesus Christ and his Apostles. In this way, the hierarchical structure of church polity is not fairly understood to be just a bureaucracy. Instead it should be understood as an expression of deeply held convictions of a faith community about their understanding of the relationship of Christ to the Church and to the vital understanding of the Apostolicity of the Church. In *Serbian Eastern Orthodox Diocese v. Milivojevich*, the Court noted that the relevant issue "essentially involves not a church property dispute, but a religious dispute the resolution of which under our cases is for ecclesiastical and not civil tribunals." 426 U.S. at 709. If one believes that Christ's authority and teaching pass down through apostolic succession, then one does not let a congregation take votes on these matters. The courts below in this case and other state courts are really saying that hierarchical churches cannot act on that belief.

construction of its organic documents,[19] (2) that it is feasible for a religious community to recall all of its deeds of property into its denominational office for legal scrutiny,[20] (3) that religious communities have large amounts of resources that can readily be allocated to legal costs,[21] and (4) even if there were unlimited church resources to hire lawyers to reflect the self-understanding of religious communities clearly in all of their "secular" legal documents, this task of reformulating these legal instruments would be relatively simple.[22] None of these assumptions is correct.

The more serious objection to the "neutral principles of law" approach is that it has not proved to be neutral at all. By definition a governmental preference for one form of polity over another is not a decision based on "neutral principles of law." Justice Brennan expressed "the clearest command of the Establishment Clause" as a guarantee that government cannot officially prefer one religious

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[19] In this case the lower courts falsely assumed that the power to amend the *By-Laws* included a right for a parish to opt out of the Church and to retain possession of the parish property. In fact the parish does not have the power to amend the *By-Laws* without the approval of the Synod. *See* note 2 above.

[20] Even a highly organized secular corporation like IBM or General Motors would find this task daunting, if not prohibitively expensive.

[21] This Church is a small religious body in this country, numbering only about 130 parishes. Its scarce resources, all of which are derived from the voluntary contributions of its members, are dedicated to the religious life of the Church. The biblical command to feed the hungry (Isaiah 58:7; Matt. 25:35) should not be construed by this Court or any other court to refer primarily to lawyers.

[22] There is no single legal formula discernible from court precedents that adequately expresses the various styles or forms of hierarchical governance.

denomination over another. *Larson v. Valente*, 456 U.S. 228, 244 (1982). Justice Brennan also regarded the "continuing vitality of the Free Exercise Clause" to be inextricably linked to "constitutional prohibition of denominational preferences." *Larson, supra*, 456 U.S. at 245. In short, both provisions of the First Amendment Religion Clause require treatment without preference for all religious denominations.

Employing the "neutral principles of law" approach, several lower courts have, perhaps unwittingly, rejected the teaching of hierarchical churches about the organizational structure of their own communities. By allowing the subordination of hierarchical polity to a congregational structure of property ownership, lower courts have distorted this Court's teaching and have produced a monstrosity that discriminates among differently organized denominations by honoring the property agreements of congregational denominations, but subordinating the arrangements of hierarchically governed religious communities to a plain vanilla congregational mold. This is precisely the sort of denominational preference that this Court forbade in *Larson, id.*, 456 at 244-45.

This Court has recognized that treatment of churches without preference mandates that all churches must be afforded the independence to define their own organizational structure, and that the structure must be given deference by civil authorities. *Milivojevich*, 426 U.S. 696, 708-20 (1976). The petitioner Church has developed a hierarchically governed scheme of organization, mandated by its faith, that deserves independence and respect from civil tribunals. Here, by contrast, the lower courts evidently looked at the church documents exclusively through a secular lens. That is a sure formula for constituional error. The task of secular tribunals is not to impose their own notions of what might be preferable in their minds, but to respect the self-understanding of religious communities, however they choose to govern

themsleves. Since *Jones v. Wolf*, this Court has declined review in numerous cases involving intra-church disputes,[23] perhaps on the view that the "neutral principles of law" approach should be given an opportunity to be tried by the state courts. Fifteen years after *Jones v. Wolf*, the Court should now give greater guidance to the state courts which are in deep disarray over how to apply this approach without violating "the clearest command of the

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[23] *See, e.g., Fortin v. Roman Catholic Bishop of Worcester*, 416 Mass. 781, 625 N.E.2d 1352, *cert. denied*, 114 S.Ct. 2164 (1994); *Crocker v. Stevens*, 210 Ga. App. 231, 435 S.E. 2d 690 (1993), *cert. denied sub nom. Conyers Community Church, Inc. v. Stevens*, 114 S.Ct. 1613 (1994); *Korean United Presbyterian Church of Los Angeles v. Presbytery of the Pacific, et al.*, 230 Cal. App. 3d 480, 281 Cal. Rptr. 396, *cert. denied*, 503 U.S. ___, 112 S.Ct. 969 (1991); *Williams v. Board of Trustees of Mt. Jezreel Baptist Church*, 589 A. 2d 901 (D.C. 1991), *cert. denied*, 503 U.S. ___, 112 S.Ct 190 (1991); *Southern Ohio State Executive Offices of Church of God v. Fairborn Church of God*, 61 Ohio App. 3d 526, 573 N.E.2d 172 (Greene County 1989), *mot. overruled*, 45 Ohio St. 3d 708, 544 N.E.2d 695 (1989), *cert. denied*, 493 U.S. 1072 (1990); *McDonnell v. Episcopal Diocese of Georgia*, 191 Ga. App. 174, 381 S.E.2d 126, *cert. denied*, 493 U.S. 935 (1989); *Presbytery of Beaver-Butler of United Presbyterian Church v. Middlesex Presbyterian Church*, 80 Pa. Commw. 211, 471 A.2d 1271, *rev'd*, 507 Pa. 255, 489 A.2d 1317, *cert. denied*, 474 U.S. 887 (1985); *Reid v. Gholson*, 229 Va. 179, 327 S.E. 2d 107 (1985), *cert. denied*, 474 U.S. 824 (1985), *reh'g denied*, 474 U.S. 1014 (1985); *York v. First Presbyterian Church of Anna*, 130 Ill.App. 3d 611, 474 N.E. 2d 716 (1984), *cert. denied*, 474 U.S. 865 (1985); *Grace Evangelical Lutheran Church v. Lutheran Church-Missouri Synod*, 118 Ill. App. 3d 151, 73 Ill. Dec. 789, 454 N.E.2d 1038 (1st Dist. 1983), *cert. denied*, 469 U.S. 820 (1984); *Grutka v. Clifford*, 445 N.E.2d 1015 (Ind. App.), *cert. denied*, 465 U.S. 1006 (1984); *First Presbyterian Church of Schenectady v. United Presbyterian Church*, 62 N.Y.2d 110, 476 N.Y.S.2d 86, 464 N.E. 2d 454, *cert. denied*, 469 U.S. 1037 (1984); *Protestant Episcopal Church v. Graves*, 83 N.J. 572, 417 A.2d 19, *cert. denied*, 449 U.S. 1131 (1981); *Wheeler v. Roman Catholic Archdiocese of Boston*, 378 Mass. 58, 389 N.E.2d 966 (1979), *cert. denied*, 444 U.S. 899 (1979).

Establishment Clause" and the "continuing vitality of the Free Exercise Clause." *Larson v. Valente*, 456 U.S. at 244-245.

This case affords the Court an opportunity to reconsider its opinion in *Jones v. Wolf*. If the Court grants the petition, we will show that in response to the first question presented, the lower court should be reversed because its analysis is deeply flawed even under the "neutral principles of law" approach.[24] In response to the second question, petitioner submits that the chaos in the lower courts suggests that the "neutral principles of law approach" has not proved to be a judicially manageable standard. For that reason alone, *Jones v. Wolf* seems ripe for reversal. *See, e.g., Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 531 (1985) (overruling *National League of Cities v. Usery* as "unworkable"); and

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[24] *Jones v. Wolf* permits state courts to rely upon church documents as a means of determining whether a religious organization is hierarchical or congregational. That minimal review of ecclesiastical structure, avoiding any theological interpretation of the religious grounds underlying it, suffices to establish the fact that a particular community is hierarchically governed. No further recourse is necessary to elaborate finding of "facts" that are wholly irrelevant to this simple determination. In this case, the Appeals Court relied upon such factors as the involvement of the Tsars or Russian nobles in the possession of chapels and other religious property in pre-revolutionary Russia. Pet. App. 9a. This "fact" is a red herring. It is as illuminating to this case as the arrangements in Elizabethan England, either by Recusant Catholics (many of whom had chapels in their homes during the period in which Catholics were prohibited under severe criminal penalties from meeting for Mass) or by Anglicans (who enjoyed the "benefits" of "the Church of England by law established"). The reason why these historical arrangements in Europe are utterly irrelevant to the disposition of property claims of the Orthodox, Roman Catholics, and Episcopalians in this country is that we rejected the concept of an established national church at the dawn of the Republic.

Planned Parenthood v. Casey, 112 S.Ct. 2791, 2808 (1992) (rule that "has proved to be intolerable simply in defying practical workability" should be overruled).

Irrespective of whether this Court decides to reverse *Jones v. Wolf* or to leave it standing, this Court should grant the writ to address the confusion that currently exists among the state courts over the correct approach to adopt in the resolution of delicate intra-church disputes. The time has come for the Court to give greater guidance and clarity to the lower courts on this matter. For example, if the Court decides to leave *Jones v. Wolf* standing, at the very least it should seize this opportunity to caution lower courts that when they attempt to resolve intra-church property disputes, they should pay greater attention to the self-understanding of religious communities reflected in their organic documents than to property deeds, which may or may not accurately reflect those communal self-understandings. The integrity of a church's beliefs should not be made to turn on an inspection of deeds that may have been prepared hastily decades ago by a real estate practitioner who had little or no concern for delicate First Amendment values, and no knowledge of this Court's interpretation of these values.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

SUPREME JUDICIAL COURT OF MASSACHUSETTS

The Primate and Bishops' Synod of the Russian Orthodox Church Outside Russia,

Plaintiffs-Appellants,

v.

The Russian Orthodox Church of the Holy Resurrection, Inc.; Victor Melehov; Peter Farnsworth; Gregory Melehov; Nina Marcinowski; Lydia Boyko; Peter Chaplain; Elizabeth Chisholm; Alexandra Logozinska; Halena Michajlow,[1]

Defendant-Appellees.

Decided July 6, 1994

RESCRIPT

OPINION

This case involves a church property dispute, brought about by a decision of the defendant corporation to leave the plaintiff, an umbrella organization of the Russian Orthodox Church outside of Russia (ROCOR), and join a different umbrella organization of the Orthodox Church. After a trial before a Superior Court judge,

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[1] Victor Melehov, rector, Peter Farnsworth, deacon; and Gregory Melehov, Nina Marcinowski, Lydia Boyko, Peter Chaplain, Elizabeth Chisholm, Alexandra Logozinska, and Halena Michajlow, members of the parish council of the named defendant corporation.

judgment entered for the defendants. The judge found that: (1) although ROCOR and the defendant parish were hierarchical in matters of faith and polity, the defendant parish was congregational in terms of property ownership, see *Antioch Temple, Inc. v. Parekh*, 383 Mass. 854, 861-862, 422 N.E.2d 1337 (1981); (2) the vote to amend the by-laws of the defendant was legal and proper; (3) the amendment of the articles of organization and the withdrawal of the defendant parish from the plaintiff umbrella organization was legal and proper; and (4) the defendant parish is the sole owner of all its assets. The Appeals Court affirmed the judgment of the Superior Court. 35 Mass. App. Ct. 194, 617 N.E.2d 1031 (1993). The issue argued before the Appeals Court was that the judge's findings were clearly erroneous. After careful review of the record, the Appeals Court concluded the contrary. Our review of the record bring us to the same conclusion, namely, that the judge's findings of fact were not clearly erroneous and hence must stand.

We granted the plaintiff's application for further appellate review. We did so primarily to give the parties an opportunity to argue whether our decision in *Fortin v. Roman Catholic Bishop of Worcester*, 416 Mass. 781, 625 N.E.2d 1352 (1994), decided after trial and after the Appeals Court's decision, warranted a different result. The parties availed themselves of this opportunity. We conclude that nothing in *Fortin v. Roman Catholic Bishop of Worcester, supra*, would alter the result. In *Fortin, supra* at 786-787, 625 N.E.2d 1352, we continued our recognition of the principle that a church could be either hierarchical or congregational in structure, or that it would be a mix of both, citing *Antioch Temple, Inc. v. Parekh, supra* 383 Mass.

at 860-864, 422 N.E.2d 1337 (see especially *id.* at 861-862, 422 N.E.2d 1337). Both the trial judge and the Appeals Court (35 Mass. App. Ct. at 196-197, 617 N.E.2d 1031), correctly applied that principle. To the extent *Fortin* discusses the doctrine of neutral principles, see *Fortin, supra* 416 Mass. at 788-789, 625 N.E.2d 1352, the result is the same. "Under the neutral principles of law approach, we may examine any relevant statute, the deeds to the property in question, and any pertinent constitutions or by-laws of the organization involved." *Id.* at 788, 625 N.E.2d 1352. The judge and the Appeals Court concluded, as do we, that under this approach the defendants prevail. The judge's exercise of jurisdiction over the property dispute was proper under either the traditional approach or the neutral principles approach. The plaintiff's attempt to recast the case as one involving a question of polity fails. Thus, for the reasons stated in the opinion of the Appeals Court, we affirm the judgment of the Superior Court.

So ordered.

APPENDIX B

APPEALS COURT OF MASSACHUSETTS,
WORCESTER

No. 92-P-392

The Primate and Bishops' Synod of the Russian Orthodox Church Outside Russia,

Plaintiffs-Appellants,

v.

The Russian Orthodox Church of the Holy Resurrection, Inc.; Victor Melehov; Peter Farnsworth; Gregory Melehov; Nina Marcinowski; Lydia Boyko; Peter Chaplain; Elizabeth Chisholm; Alexandra Logozinska; Halena Michajlow,[1]

Defendant-Appellees.

Argued April 14, 1993

Decided August 23, 1993

Before DREBEN, KASS and PRODA, JJ.

OPINION

DREBEN, Justice.

As a result of differences between members of the

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[1] Victor Melehov, rector, Peter Farnsworth, deacon, and Gregory Melehov, Nina Marcinowski, Lydia Boyko, Peter Chaplain, Elizabeth Chisholm, Alexandra Logozinska, and Halena Michajlow, members of the parish council of the named defendant corporation.

parish (Russian Orthodox Church of the Holy Resurrection, Inc.)[2] and the Russian Orthodox Church Outside of Russia (Church), the members held an extraordinary parish meeting and voted to amend their articles of organization and by-laws so as to remove all references to the Church in their by-laws. Subsequently, the parish became affiliated with another orthodox umbrella organization. The executive board (Synod) of the Church brought this action seeking a declaration that the vote at the extraordinary parish meeting was illegal and that the real and personal property of the parish is subject to the dominion and control of the Church.

After determining that the parish "was hierarchical in terms of internal administration, discipline and matters of faith," but "congregational as far as the control and use of its property," a judge of the Superior Court entered a judgment declaring that the vote at the extraordinary parish meeting was valid, and that the parish was the sole owner of all its assets. The Church has appealed, claiming that the finding that the parish is congregational as to the ownership and control of its property is clearly erroneous and, also, that the court erred in ruling that the articles of organization and by-laws of the parish were validly amended. We affirm the judgment.

1. *Evidence warranted a finding that the parish is congregational as to ownership of property.* Before discussing the evidence supporting the judge's finding, we explain its significance. The traditional judicial approach in a case involving an intrachurch argument over church property

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[2] A Massachusetts corporation located in Worcester.

is to determine where, within the religious association, the church members, prior to the schism, have placed the ultimate authority over the use of church property. *Jones v. Wolf*, 443 U.S. 595, 618-619, 99 S. Ct. 3020, 3033, 61 L. Ed.2d 775 (1979) (Powell, J., dissenting); *Antioch Temple, Inc. v. Parekh*, 383 Mass. 854, 860, 422 N.E.2d 1337 (1981). As put by Justice Powell in *Jones, supra* 443 U.S. at 619, 99 S. Ct. at 3033: "The courts, in answering this question have recognized two broad categories of church government. One is congregational, in which authority over questions of church doctrine, practice, and administration rests entirely in the local congregation or some body within it. In disputes over the control and use of the property of such a church, the civil courts enforce the authoritative resolution of the controversy within the local church itself [citation omitted]. The second is hierarchical, in which the local church is but an integral and subordinate part of a larger church and is under the authority of the general church."

Recognizing this distinction, the Supreme Judicial Court has explained that "in disputes involving hierarchical churches [the] civil courts must tread more cautiously, for the First Amendment 'permits hierarchical [churches] to establish their own rules and regulations for internal discipline and government, and to create tribunals for adjudicating disputes over these matters' [citations omitted]. Civil courts must accept as binding 'the decisions of the highest judicatories of a religious organization of hierarchical polity on matters of discipline, faith, internal organization or ecclesiastical rule, custom, or law.' " *Antioch Temple, Inc. v. Parekh*, 383 Mass. at 861, 422 N.E.2d

1337, quoting from *Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 724, 713, 96 S. Ct. 2372, 2387, 2382, 49 L. Ed.2d 151 (1976).[3]

A church may, however, be hierarchical in some matters and congregational in others. "For example, [and this is what the Superior Court judge in the present case found as to the Church] a church may be hierarchical in terms of internal administration and discipline, and yet congregational as far as control and use of its property is concerned." *Antioch, supra* 383 Mass. at 861-862, 422 N.E.2d 1337.

Since the "determination of a church's structure is a question of fact," *Id.* at 862, 422 N.E.2d 1337, citing *Wheeler v. Roman Catholic Archdiocese of Boston*, 378 Mass. 58, 62 n. 2, 389 N.E.2d 966, cert. denied, 444 U.S. 899, 100 S. Ct. 208, 62 L. Ed.2d 135 (1979), we turn to the evidence before the Superior Court judge to review the Church's claim that his finding was clearly erroneous.

Part of the analysis, of course, depends on the "ecclesiastical documents of the individual church and of any

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[3] There is also another judicial approach, the "neutral principles of law" analysis expressed in *Jones v. Wolf*, 443 U.S. 595, 602-604, 99 S. Ct. 3020, 3024-3026, 61 L. Ed. 2d 775 (1979). As explained in *Antioch Temple, Inc. v. Parekh*, 383 Mass. at 867, 422 N.E.2d 1337, that approach requires civil courts, even if the highest tribunal of a hierarchical church has ruled on a property dispute, to defer to that tribunal only on "the resolution of issues of religious doctrine or polity." In the case at bar, under this "neutral" analysis, we would reach the same result as we reach under the traditional principles for substantially the same reasons as expressed in *Antioch, supra* at 867-868, 422 N.E.2d 1337.

larger church organization with which it is associated." *Antioch, supra* 383 Mass. at 862, 422 N.E.2d 1337. The Church maintains that its "Regulations" and the parish by-laws give the Church the right to control parish and Church property.

When looked at alone, apart from the testimony at trial, the Church documents provide considerable force to the Church's position. Thus, among the matters coming within the jurisdiction of the Synod, according to the Regulations of the Church, are "[m]atters concerning church property in dioceses [and] parishes . . . coming within the jurisdiction of [the] Synod." Another Regulation states that the

> "diocesan bishop, having the overall care of his diocese and its prosperity . . . [among other matters] administers and disposes of diocesan and monastic property and supervises all other church property in the diocese, in accordance with the 41st Apostolic canon: 'We command that the Bishop have authority over the property of the church'. . . . "

The parish by-laws also lend support to the Church's contention that the Church had control over the parish's property. At the time of the parish's organization, it adopted the "normal" by-laws of the Church. While providing that the management of church and parish property is vested in the parish council, the "sale of church real estate, its alienation, exchange or cession for building purposes, shall be effected subject to the authorization of the . . . Synod." Parish property of every kind, on the other hand, may be sold, leased and ceded for building purposes by decision of the parish. Closing of the parish

must be voted by two-thirds of its members, and upon closing, "the entire personal and real estate of the parish shall be turned over to the direct management and disposition of the diocesan authorities. . . . "

In assessing the judge's findings, the documents are but part of the evidence. When the testimony at trial is considered, the judge's finding that the parish is congregational in terms of the ownership and management of its property and is not subject to the Church in such matters is not clearly erroneous. The parish, as the judge found, was always a separate legal entity and not a subdivision of any other entity. It had paid for the real estate and its other property with its own funds and always had held title in its own name. The property was never "diocesan, monastic or Church property."

The prerevolutionary manner of ownership of property by parishes of the Russian Orthodox Church, as well as the pattern of ownership of property of parishes affiliated with the Church after its founding in 1921, also provide support for the judge's finding. The testimony as to the history of the Russian Orthodox Church before the 1918 Revolution explained that the apostolic canons, of which the 41st is a part, were adopted in the third and fourth centuries, and that in the Russian Orthodox Church, the patterns of ownership of property varied over time and reflected local conditions. While the only person who could appoint a priest was the bishop, property and indeed churches belonged to various groups, including tradesmen, nobles, and the Tsars. The bishops owned their own cathedrals and some private property and often created their own small churches. An expert in Russian theological studies at the College of the Holy

Cross described the pattern as "something not unlike the crazy quilt of ownership" in the Roman Catholic Church prior to the establishment of the rigid canons of church ownership whereby the Catholic bishops took title. There was both a hierarchical system of jurisdiction and a vastly different, "almost more like a congregational notion of ownership of property side by side."[4]

After the Russian Revolution, the Russian Orthodox Church Outside Russia (Church) was established in Constantinople in 1921. The headquarters later moved to Serbia and, after the second world war, to New York City. The Orthodox Church in America, with which the parish subsequently became affiliated, was originally part of the Church, but is now a separate entity. There has been much voluntary movement of parishes in and out of the Church, as well as in and out of the other orthodox umbrella organizations.

At the time the parish left the Church in 1987, about twenty other parishes also left.[5] Among them was a

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[4] Unlike the Roman Catholic Church, there was evidence that in the Russian Orthodox Church authority is vested in the whole body of the laity as well as with the hierarchy; it was described as "an organic, as opposed to a juridical notion of authority." There was also testimony that there were congregational aspects in the orthodox faith; in theory the bishop is elected by the people as well as the clergy, and that even in appointing the priest, the bishops would not impose someone upon the parish that the parish did not want.

[5] The reason for the exodus was that these parishes considered it a breach of faith and contrary to the Regulations for the Church to make contact with the Soviet Church. The Regulations state that the basic task of the Church "is the preservation

Toronto parish which had joined the Church after having previously left the Greek Orthodox Archdioceses of North and South America. During the time the Toronto parish was affiliated with the Church, it had accumulated land and buildings having a value of over four million dollars. When the parish left, the Church made no claim to such property. Although the Toronto parish apparently had different by-laws and a different arrangement with the Church (what the arrangement entailed was not in evidence), other of the twenty parishes that left the Church had the "normal" Church by-laws,[6] yet the Worcester parish and a parish in Ipswich were the only ones whose property was demanded by the Church.

On the basis of the foregoing evidence, particularly of the considerable movement in and out of the Church by individual parishes who took with them their own property without claim by the Church, the judge's finding that the parish was congregational as far as the control and use of its property was concerned was not clearly erroneous.

2. *Validity of amendments to the articles of organization and by-laws.* The Church proffers several arguments to challenge the validity of the amendments to the articles

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abroad of complete independence of the Russian Orthodox Church from atheistic and anti-Christian forces and the overall spiritual nourishment of the Orthodox Russian flock in the diaspora, independent of nationality."

[6] The Church, in its brief, claims that parishes were required to adopt the "normal" by-laws. There is no support in the evidence for this claim, and it appears that a number of parishes had different by-laws.

of organization and the by-laws voted by the parish at the extraordinary meeting of the members held on January 4, 1987: (a) that there was neither a two-thirds vote nor compliance with the requirements that amendments are "subject to the approval of the Diocesan Bishop" and are conditional on "ratification by the Bishop's Synod"; (b) that since the articles of amendment were not filed until January 15, 1987, the by-laws could not be validly amended prior to that date and hence the January 4 amendments to the by-laws were invalid; (c) that since, as found by the trial court, the parish is hierarchical in terms of internal administration, discipline, and matters of faith, the parish's property is held in trust for the Church. The trial court properly rejected these arguments.

a. The articles of organization establish the purposes and governance of a corporation, see 1A Fletcher, Cyclopedia of Private Corporations § 164 (rev. ed. 1993), and where bylaws are in conflict with the articles, the bylaws being subordinate, the articles of organization control. G.L. c. 156B, § 16, made applicable by G.L. c. 180, § 6A. Cf. *Assessors of Boston v. World Wide Bdcst. Foundation of Mass., Inc.*, 317 Mass. 598, 604, 59 N.E.2d 188 (1945). The parish's original articles of organization gave no rights to the Synod, and under G. L. c. 180, § 7, the members were authorized to make any amendment (with certain qualifications not here applicable) which they could have included in the original articles. Nothing precluded the 1987 amendment which provided "that the by-laws of the corporation may be amended by a two-thirds vote of the members of the corporation without the consent or approval of any other person." Not only was the amendment authorized, but the original by-law requiring

approval by non-members of the corporation was, itself, of questionable validity. See *Greek Orthodox Community v. Malicourtis*, 267 Mass. 472, 483, 166 N.E. 863 (1929).[7]

Under the by-laws (both original and as amended), parish members who have failed for twelve months to pay their membership dues are excluded from parish membership. The Church's claim that the vote lacked a two-thirds majority because two members were entitled, but not permitted, to vote is without merit as there was evidence that those two members had not paid dues for twelve months.

b. We also reject the Church's argument based on *Guterman v. Rice*, 121 F.2d 251, 253-254 (1st Cir.), cert. denied, 314 U.S. 680, 62 S. Ct. 181, 86 L. Ed. 544 (1941), that the vote to amend the by-laws was ineffective because the vote was taken prior to the effective date of the amendment to the articles of organization.[8] In *Guterman*,

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[7] Speaking of a regulation which required approval of a spiritual leader (metropolitan) in all matters concerning the management of the community, the court in that case said:

> "Such a regulation, putting it out of the power of the corporation to amend its constitution except with the approval of Metropolitan Komvopoulos, is 'unreasonable and inconsistent with the legal right of control of the affairs of the corporation existing in its membership,' and in such form it is 'utterly subversive of the right of control of a corporation which belongs to its members.' *Saltman v. Nesson*, [201 Mass. 534, 542, 88 N.E. 3 (1909)]."

[8] The amendment was filed on January 15, 1987, eleven days after the vote. There is no statutory provision making such filing untimely. See G.L. c. 156B, §§ 72, & 6, made applicable by G.L. c. 180, § 7. Section 72 provides that the amendment takes effect when filed.

the issue was whether a chattel mortgage was properly recorded, a question which depended on the residency of the domestic corporation for purposes of the chattel mortgage recording act. Since there was no showing that the corporation had complied with the statutory requirement that its articles of association be amended to reflect its new residence or that such an amendment had been certified or recorded, the court held that a change in legal residency enacted in its by-laws was not effective. It considered the filing requirements to have been enacted for the benefit of creditors. Unlike the *Guterman* case where it was not shown that the article of association had been amended, let alone filed, the amendment of the articles in the case at bar was both voted and filed; moreover, it in no way affected the rights of any creditors or any member of the public, except the Church, which knew full well the nature of the votes.

Of significance in our decision that the amendment to the by-laws was valid is the analogous situation when a corporation is first organized. See G.L. c. 156B, § 12. That section also provides that original articles of organization only become effective when filed. Yet the section requires the adoption of by-laws and does not suggest that the by-laws must await the filing of the articles of organization with the State Secretary. The implication is to the contrary. Where the rights of creditors or other reliance interests are not involved, we see no reason to hold that a by-law is invalid solely because it was adopted simultaneously with an amendment to the articles of organization. The amended by-laws became effective no later than the time when the amendment to the articles of organization was filed.

c. The last argument of the Church, namely that a trust was created, is refuted by the evidence. The original articles of organization did not mention the Church,[9] and there was testimony that there were other umbrella organizations for Russian Orthodox parishes outside Russia, other than the Church. Indeed, other than the commemoration of a different bishop (spiritual leader), the testimony was that the services of the parish were maintained in "the exact same manner" after the parish left the Church. Neither the documents nor the testimony suggests that a trust was created. See *Greek Orthodox Community v. Malicourtis*, 267 Mass. at 480-481, 166 N.E. 863; *St. Michael's Ukrainian Greek Catholic Church of Woonsocket, R.I. v. St. Michael's Ukrainian Orthodox Church of Woonsocket, R.I.*, 288 Mass. 258, 261-262, 192 N.E. 628 (1934).

Judgment affirmed.

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[9] The original articles listed the following purposes: "To unite the faithful around the parish church according to the teachings, canons, customs and rules of the Russian Orthodox Church, in order to satisfy the religious needs of the members of the parish and to uplift their spiritual and moral level."

APPENDIX C

COMMONWEALTH OF MASSACHUSETTS

WORCESTER, ss. SUPERIOR COURT
CIVIL ACTION
NO. 87-3146

THE PRIMATE AND BISHOPS' SYNOD
OF THE RUSSIAN ORTHODOX CHURCH
OUTSIDE OF RUSSIA

vs.

REV. VICTOR MELEHOV, and others[1]

FINDINGS, RULINGS AND ORDER

This matter was before the Court for trial on July 22 and 23, 1991. This action arose after the defendants, members of the parish council of the Russian Orthodox Church of the Holy Resurrection, Inc., voted to amend their Articles of Organization so that they could freely amend their by-laws. The plaintiff, Russian Orthodox Church Outside of Russia ("ROCOR"), seeks declaration and injunctive relief asking this court to, in essence, grant the property of the local church, standing in the church's name to ROCOR.

After hearing the testimony, arguments of counsel and review of the documentary evidence this court makes the following Findings of Fact and Rulings of Law:

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[1] Rev. Peter Farnsworth, Gregory Melehov, Nina Marcinowski, Lydia Boyko, Peter Chaplain, Elizabeth Chisholm, Alexander Logozinski, Halena Michajlow, and the Russian Orthodox Church of the Holy Resurrection, Inc.

FINDINGS OF FACT

1. ROCOR is a New York corporation organized under the laws of New York sometime in 1952.

2. The Synod is, in effect, the executive board of the Council of Bishops of ROCOR. The Council of Bishops is the "law making, administrative, judicial and controlling body" of ROCOR and has authority over "questions of a general church nature concerning faith, morals, services, church administration [National Church], church discipline, general religious instruction, and also the church court of appeal."

3. The Russian Orthodox Church of the Holy Resurrection, Inc. ("Holy Resurrection Parish") is a Massachusetts corporation organized pursuant to G.L. c. 180. Its purpose was "to unite the faithful around the parish church according to the teachings, canons, customs and rules of the Russian Orthodox Church . . . " The other defendants are members of the board of directors of this corporation and are known as the "parish council."

4. When the Holy Resurrection Parish was organized the corporation adopted a set of "normal" by-laws of ROCOR promulgated by the Synod. Pursuant to these by-laws the parish council is the "managing organ of the corporation." The by-laws also specifically stated that "amendments to the by-laws can only be made at annual parish meetings with the consent of two-thirds of the parish members, subject to the approval of the diocesan bishop and to ratification by the Synod." The by-laws further specify that "the sale of church real estate, its alienation, exchange or cession for building purposes shall be effected subject to the authorization of the

Bishop's Synod." The by-laws further provide that extraordinary parish meetings may be convened, among other ways, by the pastor of the parish or the parish council.

5. On December 21, 1986, the Holy Resurrection Parish Council voted to hold an extraordinary parish meeting to amend the Articles of Organization and restate the parish by-laws. The purpose of the meeting was to:

> "change the Articles of Organization of the Holy Resurrection Parish to permit amendment of the Bylaws of the corporation by a vote of 2/3 of the Holy Resurrection Parish and to ratify the incumbent parish council as the parish council made the amended and restated Bylaws."

This extraordinary parish meeting was convened in accordance with the then existing by-laws.

6. At the extraordinary meeting the members of the Holy Resurrection Parish amended their Articles of Organization as follows:

> . . . The Bylaws of the corporation may be amended by a two-thirds vote of the members of the corporation without the consent or approval of any other person.

After this amendment to the Articles of Organization was approved the members voted to change their by-laws. The amendment of the by-laws removed all references to the Synod and made the corporation's autonomy unmistakably clear.

7. The church land and building is and always has been in the name of the Russian Orthodox Church of the

Holy Resurrection, Inc. It is a Massachusetts corporation. The personal property and icons over which the Synod seeks control are in the possession of the members of the Holy Resurrection Parish and are kept in the church building.

8. The property of the Holy Resurrection Parish was never "diocesan, monastic or church [national] property." Title has always been held in the name of the Massachusetts corporation.

9. The Holy Resurrection Parish, although it affiliated with ROCOR, and received its ecclesiastical guidance from ROCOR, never gave up its power to control or use its own property or to administer its parish as the members saw fit. The Russian Orthodox Church of the Holy Resurrection, Inc. was always a separate legal entity and was not a subdivision of any other entity.

10. Of historical and evidentiary significance, the Russian Orthodox Church has not always maintained, owned or controlled the property of the local parish. Indeed, local parish churches have been owned and controlled by secular governments, local parish organizations and local individuals throughout the history of the church. Back to its earliest roots the Russian Orthodox Church was forbidden to own any property at all. ROCOR did not, therefore, own the church building of the Holy Resurrection Parish.

11. The Holy Resurrection Parish combined elements of both hierarchical and congregational polity. The Holy Resurrection Parish was hierarchical in terms of internal administration, discipline and matters of faith

while remaining congregational as far as the control and use of its property.

RULINGS OF LAW

1. This court may use neutral principles of law in resolving church property disputes. *Antioch* v. *Parekh*, 383 Mass. 854, 859 (1981), quoting, *Jones* v. *Wolf*, 443 U.S. 595 (1979).

2. The Russian Orthodox Church of the Holy Resurrection, Inc. is a Massachusetts Corporation with a separate legal entity and is not a subdivision of any other entity.

3. Title to the property in question is in the name of the Holy Resurrection Parish alone.

4. The Articles of Organization and by-laws were validly amended at the January 5, 1987 extraordinary meeting. G.L. c. 180, § 7.

5. In resolving church disputes, Massachusetts courts distinguish between congregational and hierarchical church. *Antioch* v. *Parekh*, 383 Mass. 854, 860 (1981).

6. "An individual church may combine elements of both hierarchical and congregational policy. For example, a church may be hierarchical in terms of internal administration and discipline, and yet congregational as far as control and use of its property is concerned. *Antioch* v. *Parekh*, 383 Mass. 854, 862 (1981), citing, *Maryland & Virginia Eldership of the Churches of God* v. *Church of God at Sharpsburg*, 249 Md. 663-666, 674 (1967), vacated and remanded, 393 U.S. 528 (1969), on remand, 254 Md. 162

(1969), dismissed for want of a substantial federal question, 396 U.S. 367 (1970).

7. The valid amendment of the articles and by-laws confirmed the congregational nature of the Holy Resurrection Parish. It retained control over the administration of its own affairs, especially with regard to property.

ORDER FOR JUDGMENT

Based on the above Findings and Rulings, it is declared that:

1. The Russian Orthodox Church of the Holy Resurrection is hierarchical in terms of matters of faith and may be subject to the authority of the Russian Orthodox Church Outside of Russia in such matters.

2. The Russian Orthodox Church of the Holy Resurrection is congregational in terms of the ownership, management and control of its real estate and personal property and it is not subject to the authority of the Russian Orthodox Church Outside of Russia in such matters.

3. The vote to amend the by-laws at the extraordinary parish meeting on January 4, 1987 was legal and proper.

4. The amendment of the Articles of Organization and the withdrawal of the Russian Orthodox Church of the Holy Resurrection from the Diocese of Eastern America and New York of the Russian Orthodox Church Outside of Russia is legal and proper.

5. The Russian Orthodox Church of the Holy Resurrection is the sole owner of all of its assets and is under no obligation to account to the Russian Orthodox Outside of Russia for the use or disposition of these assets.

James P. Donohue
Justice of the Superior Court

DATED: August 1, 1991.
[s.d. & ckg]

APPENDIX D

COMMONWEALTH OF MASSACHUSETTS
SUPERIOR COURT DEPARTMENT
OF THE TRIAL COURT

WORCESTER, SS. CIVIL ACTION NO. 87-3146

THE PRIMATE AND BISHOPS' SYNOD OF THE RUSSIAN ORTHODOX CHURCH OUTSIDE RUSSIA,

Plaintiff

vs.

REV. VICTOR MELEHOV, REV. PETER FARNSWORTH, GREGORY MELEHOV, NINA MARCINOWSKI, LYDIA BOYKO, PETER CHAPLAIN, ELIZABETH CHISHOLM, ALEXANDRA LOGOZINSKA, HALENA MICHAJLOW, and THE RUSSIAN ORTHODOX CHURCH OF THE HOLY RESURRECTION, INC.,

Defendants

JUDGMENT

This matter came on for trial before the court Donohue, J. presiding, and the issues having been duly tried and findings having been duly rendered,

It is Ordered and Adjudged and Declared that:

1. The Russian Orthodox Church of the Holy Resurrection is hierarchical in terms of matters of faith and

may be subject to the authority of the Russian Orthodox Church outside of Russia in such matters.

2. The Russian Orthodox Church of the Holy Resurrection is congregational in terms of the ownership, management and control of its real estate and personal property and it is not subject to the authority of the Russian Orthodox Church Outside of Russia in such matters.

3. The vote to amend the by-laws at the extra-ordinary parish meeting on January 4, 1987 was legal and proper.

4. The amendment of the Articles of Organization and the withdrawal of the Russian Orthodox Church of the Holy Resurrection from the Diocese of Eastern America and New York of the Russian Orthodox Church Outside of Russia is legal and proper.

5. The Russian Orthodox Church of the Holy Resurrection is the sole owner of all of its assets and is under no obligation to account to the Russian Orthodox Outside of Russia for the use or disposition of these assets.

Dated at Worcester, Massachusetts this fifth day of August, 1991.

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First Assistant Clerk

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APPENDIX E

REGULATIONS OF THE RUSSIAN ORTHODOX CHURCH OUTSIDE OF RUSSIA

Confirmed by the Council of Bishops in 1956 and by a decision of the Council dated 5/18 June, 1964.

1. GENERAL

1. The Russian Orthodox Church Abroad is an indissoluble part of the Russian Orthodox Church, and for the time until the extermination in Russia of the atheist government, is self-governing on conciliar principles in accordance with the resolution of the Patriarch, the Most Holy Synod, and the Highest Church Council of the Russian Church dated 7/20 November, 1920, No. 362.

2. The Russian Orthodox Church Abroad is composed of those who are outside the borders of Russia and are guided by the lawful hierarchy of a diocese with their parishes, church communities, spiritual missions and monasteries.

3. The basic task of the Russian Orthodox Church Abroad is the preservation abroad of complete independence of the Russian Orthodox Church from atheistic and anti-Christian forces and the overall spiritual nourishment of the Orthodox Russian flock in the diaspora, independent of nationality; and in particular, the preservation and strengthening in the souls of the faithful flock the purity and wholeness of the holy Orthodox faith; and

the encouragement of devotion in the flock, dispersed throughout the world, to the suffering Mother Church.

4. In her internal life and administration, the Russian Orthodox Church Abroad is guided by Holy Scripture and Tradition, by the holy canons and Church laws, the regulations and pious customs of the Church of Russia and, in particular, by the resolution of His Holiness the Patriarch, the Most Holy Synod, and the Highest Church Council of the Russian Orthodox Church dated 7/20 November, 1920, No. 362, by the resolutions of councils and declarations of the Russian Orthodox Church Abroad, in which is included the present statute.

5. The administration of the Russian Orthodox Church Abroad is carried out by a Council of Bishops through the First Hierarch and Synod, and through diocesan bishops.

6. All organs of Church administration, beginning with the First Hierarch and Synod of Bishops and others in descending order, must subject their acts to scrutiny and control, according to the prescribed chain of authority.

2. COUNCIL OF BISHOPS

7. The Council of Bishops is to be convoked annually, if possible, in accordance with Church canons, and it is the highest law-making administrative, judicial and controlling body in the Russian Orthodox Church Abroad.

8. The President of the Council of Bishops and the Synod of Bishops is the First Hierarch of the Russian Orthodox Church Abroad, being the Metropolitan, and is elected for life by the Council. All bishops of the Russian Orthodox Church Abroad are members of the Council.

* * *

11. The following matters come within the authority of the Council of Bishops:

1. The election of the First Hierarch of the Russian Orthodox Church Abroad, for life, with his elevation to the rank of Metropolitan;

2. The election of two deputies of the First Hierarch who will be vice-presidents of the Synod, two members of the Synod of Bishops, and two deputies of the members of the Synod;

3. Questions of a general church nature concerning faith, morals, services, church administration, church discipline, general religious instruction, and also the church court of appeal;

4. Matters of a principal character concerning contemporary schisms and false teachings; and also defence of the rights of the Russian Orthodox Church Abroad before governments and various institutions;

5. Publication of epistles and other acts in the name of the whole Russian Orthodox Church Abroad.

6. Establishment of diocesan sees, their closure, and alteration in diocesan boundaries; similarly, the opening or organization of new missions and their closure;

7. The election, nomination, transfer, retirement and rewarding of bishops.

* * *

3. THE SYNOD OF BISHOPS

16. The Synod of Bishops is the executive organ of the Council and is composed of the chairman, who is the First Hierarch of the Russian Orthodox Church Abroad, his two deputies and four members, of whom two are elected by the Council for the period between Councils, and two are summoned from dioceses for a four-month period in order of turn; and also of two of their deputies summoned to the meeting of the Synod at the discretion of the chairman.

17. In cases of discussion and decision by the Synod of extremely important matters, and also judgments in respect of bishops at first instance, the composition of the Synod shall be enlarged by other bishops, expressly invited by the First Hierarch.

* * *

29. The following matters come within the jurisdiction of the Synod of Bishops:

1. The appointment of ruling bishops from those available; the appointment and transfer of vicar bishops; the appointment and release of heads of missions; the retirement of bishops during the inter-Council period;

2. The arranging for the election of new bishops in the inter-Council period by way of requesting written opinions from all bishops;

3. The establishment of cathedral sees, their closure, and alteration of borders in inter-Council periods, if there be urgent need;

4. The reuniting of bishops to the Church who have apostacized and the reception of those who come from other faiths;

5. The composition (which shall be enlarged) of a court at first instance in respect of bishops;

6. The hearing of complaints and formation, with normal Synod membership, of an appeal court in respect of clergy, and confirmation of decisions by diocesan courts to defrock clergy, submitted by dioceasn bishops;

* * *

22. The supervision and partial alteration of pre-existing rules and statutes by which are regulated the life, activity and administration of existing and potential parishes, brotherhoods, sisterhoods, various diocesan and parochial educational and philanthropic organisations, institutions of the Synod of Bishops, theological schools, spiritual missions and convents and monasteries;

23. Matters concerning the strengthening and defence of the rights of the Russian Orthodox Church Abroad in respect of her legal status, existence and activity, and of her organs;

24. Matters concerning church property in dioceses, parishes, brotherhoods, sisterhoods, spiritual missions, monasteries and theological schools, coming within the jurisdiction of Synod;

25. The supervision and decision of matters concerning spiritual missions and theological schools, directly subject to Synod;

26. The resolution of difficult questions coming from dioceses and other places or people, and also arising as a result of incompleteness or lack of clarity of church laws and conciliar decisions;

27. Appeals by epistle or addresses to archpastors, pastors, monastics, brotherhoods, and to the flock, as circumstances demand;

* * *

4. THE FIRST HIERARCH

33. The First Hierarch, holding the rank of Metropolitan, heads the Russian Orthodox Church Abroad. He is elected for life by the Council of Bishops from among those of the episcopate who are available.

34. The name of the First Hierarch shall be commemorated at services in every church of the Russian Orthodox Church Abroad, before the name of the local ruling bishop.

35. The residence of the First Hierarch shall have a domestic chapel in which shall be kept the holy, wonderworking Kursk-Root icon of the Mother of God of the Sign.

36. The First Hierarch is, at one and the same time, the diocesan bishop of that diocese of the Russian Orthodox Church Abroad in which he constantly resides, and the rector of the Metropolitan's cathedral church. He administers, with the rights of a diocesan bishop, those churches not included in any other diocese and directly subject to him. His vicar helps him administer the churches subject to him.

37. The First Hierarch, besides being chairman of the Council and Synod, possesses the following rights:

1. He has the general care for the well-being of the Russian Orthodox Church Abroad, both internally and externally;

2. To call ordinary and extraordinary Councils of Bishops, and also the All-Diaspora Councils with the participation of clergy and laity, of which he is also chairman;

3. He is the chairman of the Council of Bishops;

4. To present to the Council accounts of the condition of the Russian Orthodox Church Abroad during the period between councils;

5. To communicate with representatives of autocephalous Orthodox Churches on questions of church life, in fulfilment of resolutions of the Council or Synod, and also in his own name;

6. To communicate with government authorities on matters affecting the Russian Orthodox Church Abroad;

* * *

5. DIOCESES AND DIOCESAN BISHOPS

40. The Russian Orthodox Church Abroad is divided into dioceses whose boundaries are established by the Synod with definitive confirmation by the Council of Bishops.

41. Every diocese is under the administrative control of its diocesan bishop.

42. Bishops of dioceses that are located in a certain part of the world, may periodically gather for meetings, under the chairmanship of the most senior of them, or of the bishop who is representative of the Synod.

43. Every diocese should have a Diocesan Council to assist the diocesan bishop in the administration of the diocese and it should be under his direct control and be subject to him.

44. Diocesan administration as well as the diocesan church court should be conducted according to the principles set out in para. 4 of these Regulations.

45. The diocesan bishop, as the head of a local church (the diocese), enjoys, by divine ordinance, the complete fullness of episcopal power, that is, to teach, to perform divine services, to administer a court and give judgment, within the boundaries of his diocese.

46. To the diocesan bishop belongs the right of initiative and direct leadership in all aspects of diocesan life.

47. The diocesan bishop, having the overall care of his diocese and its prosperity –

1. opens and closes parishes and defines their boundaries;

2. appoints, transfers in case of need, when it would be beneficial, and dismisses, rectors of parishes and other clergy;

3. confirms in their position abbots and abbesses of monasteries and sketes for men and women, and their deputies;

4. with the blessing of the Synod of Bishops, opens and closes monasteries and sketes in his diocese;

5. sets up deaneries and appoints and dismisses deans;

6. ordains clergy and consecrates churches and antiminses;

7. gives permission for the construction, opening and repair of churches, chapels and cemeteries;

8. guides the spiritual education of his flock, with missionary and charitable activities;

9. supervises the teaching of catechism;

10. visits parishes, monasteries and theological schools, and in necessary cases, points out defects and omissions to the proper person and gives corresponding instructions, exhortations and orders;

11. gives guiding instructions to diocesan clergy regarding serving, church school and other pastoral and clerical duties;

12. supervises the personal moral purity of life and good conduct of all church servers and the flock;

13. in all necessary cases, brings archpastoral pressure to bear by admonishment, warning, imposition of *epitimias*, distraint, temporary removal from serving, or complete dismissal;

14. in necessary cases, entrusts bodies under his jurisdiction to conduct closed or public enquiries or formal investigations;

15. confers awards on clergy up to the *kamilavka,* inclusively, awards the Holy Gospel or holy icons and confers his blessing on clergy and laity in the form of certificates, etc.;

16. permits the establishment of church brotherhoods and sisterhoods, philanthhropic, educational and other beneficial institutions and closes them, confirms their rules and controls them;

17. with the permission of the Synod of Bishops, opens seminaries for the training of candidates for the priesthood and precentors, presenting the regulations and curricula for these schools for the training of chanters and precentors, teachers and preceptors, and, in general, has overall guidance and supervision of schools. *NOTE:* Curricula of seminaries are confirmed by the Synod of Bishops at the representation of a member of the Schools Committee.

18. administers and disposes of diocesan and monastic property and supervises all other church property in the diocese, in accordance with the 41st Apostolic canon: "We command that the Bishop have authority over the property of the church";

* * *

25. confirms the resolutions of parish meetings, elections of church wardens, and other elective office-bearers in the parishes;

26. is the rector of his cathedral church.

* * *

52. A diocesan bishop has no episcopal rights within the borders of another diocese, otherwise than with the leave and permission of the local diocesan bishop.

53. A diocesan bishop may not accept clergy or monks from another diocese to serve in his diocese, without a canonical release. It is also forbidden, under pain of strict responsibility, to allow people to serve who have been deprived of their clerical rank, or been forbidden to serve by another bishop of another diocese of the Russian Orthodox Church Abroad.

* * *

APPENDIX F

NORMAL PARISH BY-LAWS ADOPTED
BY RESPONDENT IN 1952

BY-LAWS

I

(Name and Purpose)

1. The name of the parish shall be the RUSSIAN ORTHODOX CHURCH OF THE HOLY RESURRECTION, INC. It is a part of the East-American Diocese of the Russian Orthodox Church Abroad and is canonically supervised by the Diocesan-Bishop, directly by the parish priest, who is lawfully appointed by the Ruling Bishop.

2. The purpose of the parish shall be to unite the faithfuls around the parish church according to the teachings, canons, customs and rules of the Russian Orthodox Church, in order to satisfy the religious needs of the members of the parish and to uplift their spiritual and moral level.

II

(General Rules. Jurisdiction. Clergy.)

3. According to the purpose of the Church, the parish takes care:

(a) Of the church building;
(b) The maintenance of the clergy;
(c) The economic prosperity of the parish and the care of the needs of the Church, the clergy and all parish institutions, the diocesan and social needs;
(d) Charitable work; and

(e) Educations work in the spirit of the Orthodox Church.

4. In conjunction with the parish church there shall be a clergy of not less than two members, viz. the pastor and the deacon, or the psalmist-precentor, who shall receive living accommodations and subsistence from the parish. The clergy shall be appointed by the diocesan authorities. The number of the members of the clergy may be increased or reduced by the Ruling bishop in accordance with the capacity and needs of the parish.

5. The boundaries of the parish may be changed by the diocesan authorities pursuant to the request of the parishioners and subject to the consent of the clergy of that parish where such changes are to be effected.

6. The establishment of a new parish shall be effected pursuant to the request of the faithfuls with the permission and blessing, or by order of, the diocesan authorities.

7. A priest or a person in the service of the church, as well as a layman, who secedes from the Russian Orthodox Church Abroad and refuses to recognize the authority of the Russian Orthodox Bishops' Synod Abroad, shall not be permitted to occupy any office in the parish.

8. Priests and persons in the service of the church shall be considered lawfully appointed if they occupy the said offices by appointment and permission and with the blessing of the Ruling Bishop appointed to this office by the Bishops' Synod of the Russian Orthodox Church Abroad.

9. The pastor shall be the immediate supervisor of the parish and he shall be held responsible for its welfare before the diocesan authorities.

10. The Ruling Bishop may, if he should deem it necessary, appoint a second priest as assistant to the pastor. The question of the maintenance of such an assistant shall be settled by the diocesan authorities acting in agreement with the Parish Council.

III

(Parishioners and Parish Members)

11. All Orthodox Christians of both sexes, regardless of their nationality, who have reached the age of 21 years, who pay the established membership dues; and, who make their confessions, take Holy Communion not less than once a year and who take care of the morals and economic welfare of the parish may become parish members.

* * *

12. All parish members shall be recorded by the Secretary of the Church Parish Council in a special register. The membership enrollment shall be made by the Church Parish Council pursuant to written applications.

13. All parish members, except those mentioned in Annotation 2 under paragraph 11, who regularly pay the membership dues and other obligatory dues fixed by the diocesan meetings, shall have the right to participate with a decisive vote in all parish meetings, to elect parish officials and to be elected to parish offices.

Annotation 1. The newly admitted members of the parish shall acquire the right to vote and to be elected to parish offices upon the expiration of six months after their admission to parish membership.

Annotation 2. Parish members who shall have failed to pay their membership dues during three months shall be deprived of their right to vote and to be elected to parish offices pending the payment of such arrears. Parish members who shall have failed to pay their membership dues during twelve months shall be excluded from parish membership. However, should a parish member fail to pay his dues because of some valid reason (illness, unemployment, etc.) the question of his right to vote shall be determined by the Church Parish Council.

14. Parish members who shall be found disloyal to the Russian Orthodox Church Abroad and to their parish; or who deliberately neglect church rules and obstruct lawfully adopted resolutions of the parish meetings and the instructions of the Church Parish Council, as well as those who shall have violated the good order and decorum in the church or who shall be found engaged in some ignoble occupation may be excluded from parish membership by decision of the Church Parish Council. The said persons may be restored in their rights by decision of the Church Parish Council provided they repent and prove by their way of living and behavior their moral rectitude.

15. Persons who shall have rendered particularly valuable services to the parish may be elected trustees by the Annual Parish Meeting.

IV

(Managing Organs and Officers)

16. The following shall be the managing organs:

A. The general meeting of the members of the parish hereinafter called parish meeting;
B. The Church Parish Council;
C. The Auditing Committee.

A. USPARISH MEETINGS

17. Parish meetings shall be: (1) Annual and (2) Extraordinary.

1. ANNUAL PARISH MEETINGS

18. The time for the convening of the Annual Parish Meeting shall be fixed by the Church Parish Council. Not later than three weeks prior to the Annual Parish Meeting the Church Parish Council shall mail notices on the convening thereof together with the agenda. In addition thereto, the pastor, prior to the Annual Parish Meeting, shall announce its convocation from the steps before the alter on three successive Sundays after the divine service.

19. The pastor, or in case of his absence or illness, a priest substituting him, shall preside over the Annual Parish Meeting. The Vice President shall be elected by the meeting from among the laymen. When a matter is deliberated upon which pertains to the pastor personally as well as when candidates to the members of the staff clergy are elected, it shall be obligatory that the provost, or another person appointed by the Ruling Bishop, preside over the meeting.

20. The following shall be within the competency of the Annual Parish Meeting:

(a) The election of the Warden, the members of the Church Parish Council, the Auditing Committee and the Trustees.

(b) The examination of the report of the Church Parish Council on the activities of the parish during the expired year.

(c) The examination and ratification of the Warden's and Treasurer's reports.

(d) The examination and ratification of the report of the Auditing Committee and the financial estimate for the forthcoming year.

(e) The fixing of the amount of the membership dues and other items of self-taxation.

(f) The amendment of the By-Laws of the parish.

Annotation. Canonical matters as well as jurisdictional matters (1-10) shall not be within the competency of either the Annual or Extraordinary Parish Meetings.

21. The Annual Parish Meeting shall be considered valid in the presence of a quorum of two-thirds of the parish members.

* * *

24. The minutes of the Annual Parish Meetings, after having been adopted by an editing committee elected by the meeting, shall be submitted not later than seven days thereafter, by the pastor of the parish to the Ruling Bishop for his ratification.

2. EXTRAORDINARY PARISH MEETINGS

25. Extraordinary Parish Meetings, if necessary, may be convened:

(a) By order of the Ruling Bishop;
(b) By the pastor of the parish;
(c) By the Church Parish Council;
(d) At the request of the Auditing Committee;
(e) Pursuant to a written request of not less than one-third of the parish members submitted to the Church Parish Council.

26. All provisions of the By-Laws pertaining to the convening of the Annual Parish Meetings (18) and the keeping of the minutes (23 and 24) shall be likewise applicable to the Extraordinary Parish Meetings.

* * *

V

(Church and Parish Property)

44. The following shall be a part of the property of the church:

(a) The church building with all its appurtenances as well as churches, oratories and chapels annexed to the parish church;
(b) Everything that is donated to the church and brought to God's altar, for instance: articles needed for church use;
(c) Personal and real property donated for the adornment of the church;
(d) Monies received by the church from different sources, viz; candle-sales profits, jug

and plate monies, residues of profits, incomes derived from real estate and quit-rent, and from the sale of plots in parish cemeteries and various sundry incomes;

(e) Personal and real property and capital funds specifically donated or bequeathed to the church for its benefit or to its ownership, even though with a special designation for charitable and educational needs of the parish or the maintenance of the clergy.

45. Parish property shall consist of every kind of personal and real property and capital funds received for the satisfaction of the religious and educational as well as charitable needs of the parish. To these shall belong:

(a) Voluntary payment;
(b) Plate collections within the boundaries of the parish;
(c) Voluntary collections under subscription lists;
(d) Voluntary donations in kind by the parishioners;
(e) Incomes from real estate owned by the parish;
(f) Incomes from quit-rent;
(g) Collections made by decision on the general Parish meetings.

46. The management of the church and parish property and the capitals shall be vested in the Church Parish Council.

47. Church real estate may be purchased or otherwise acquired out of church funds with the permission of the diocesan authorities, by decision adopted either by

the Annual Parish Meeting or by the Extraordinary Parish Meeting especially convened therefor. The sale of church real estate, its alienation, exchange or cession for building purposes, shall be effected subject to the authorization of the Bishops' Synod.

* * *

VII

Amendment of the Parish By-Laws)

54. Amendments of these By-Laws may be made, if warranted by local conditions, not otherwise than with the consent of 2/3 of the parish members at a lawfully convened Annual Meeting, subject to the approval of the Diocesan Bishop, and on condition that such amendment in the By-Laws be ratified by the Bishops' Synod.

55. The suggested text of the paragraphs of the By-Laws, which it is proposed to amend, shall be incorporated into the notices convening the respective Annual Meeting.

VIII

(Closing of the Parish)

56. The closing of the parish can take place not otherwise than subject to the method set forth in ¶ 54 of these By-Laws, while the entire personal and real estate of the parish shall be turned over to the direct management and disposition of the diocesan authorities as per the direction of the Ruling Bishop.

(2)

Supreme Court, U.S.
FILED
DEC 19 1994
OFFICE OF THE CLERK

No. 94-966

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

PRIMATE AND BISHOPS' SYNOD OF THE RUSSIAN ORTHODOX CHURCH OUTSIDE OF RUSSIA,
Petitioner,

v.

RUSSIAN ORTHODOX CHURCH OF THE HOLY RESURRECTION, INC., AND OTHERS,
Respondents.

ON A PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

BRIEF IN OPPOSITION

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17 pp

QUESTION PRESENTED

In a church property dispute between a national church organization and a local church corporation, did the state supreme court correctly hold that there was no clear error in the trial court's findings of fact to the effect that the local church corporation was hierarchical in matters of faith and polity but congregational in terms of property ownership?

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STATEMENT OF THE CASE

Respondents are the Russian Orthodox Church of the Holy Resurrection, Inc. ("Corporation") and the members of the Corporation's board of directors. Respondents present the following statement to correct inaccuracies and omissions in the statement of the case made by the petitioner, Primate and Bishops' Synod of the Russian Orthodox Church Outside of Russia ("Synod"). In the following statement, all facts not taken from the opinions of the state courts are drawn from the appellate record.

The Russian Orthodox Church. The Orthodox Church became established in Russia in the 10th century. Early in this century, after the Bolshevik Revolution, many of the faithful fled Russia. They formed a new organization to preserve their independence from the post-revolutionary church, which was controlled by the government of the Soviet Union. The new organization became known as the Russian Orthodox Church Outside of Russia ("ROCOR"). The Synod serves essentially as the executive board of ROCOR.

In 1956, ROCOR's Council of Bishops promulgated its "Regulations". The Regulations articulate the organizational structure of ROCOR.

ROCOR is not the only umbrella organization for Russian Orthodox churches located outside the former Soviet Union. At least two other umbrella organizations have existed for many years.

The Corporation. Russian Orthodox Church of the Holy Resurrection, Inc. is a Massachusetts corporation formed in 1952. The Corporation's Articles of Organization state its purposes as follows:

> To unite the faithful around the parish church according to the teachings, canons, customs and rules of the Russian Orthodox Church, in order to satisfy the

> religious needs of the members of the parish and to uplift their spiritual and moral level.

Nowhere in the Articles of Organization is there any mention of ROCOR or the Synod.

Under Massachusetts law, the Corporation is a separate legal entity; it is not a subsidiary of any other entity. The members of the Corporation control membership. Neither the Synod nor any member of the Synod is a member of the Corporation. The members of the Corporation elect their own officers and directors.

At its inception the Corporation chose to affiliate with ROCOR and to adopt a form of by-laws suggested by the Synod. The By-laws state the purposes of the Corporation in words identical to those in the Articles of Organization. The By-laws provide that the Corporation is affiliated with ROCOR and that any amendment of the By-laws must be ratified by the Synod. The Articles of Organization, however, contain no such provisions.

Real estate. In 1952 the Corporation purchased certain parcels of land, including a church building and a parsonage. The deed contained no mention of ROCOR or the Synod. The Synod contributed none of the purchase price and never paid for maintenance, insurance, or other costs of the property. In 1973 the Corporation sold the parsonage. None of the proceeds of the sale went to the Synod. In 1980 the Corporation sold another house, which it had acquired with its own funds in 1975. Again, none of the sale proceeds went to the Synod. There is no evidence that the Corporation sought the Synod's approval for any of these real estate transactions.

Evolution of the dispute. In the mid-1980's, certain controversies arose between the Synod and a substantial number of its clergy, parishes, and other organizations. A mass exodus ensued. In 1986 and 1987, approximately twenty-one parishes,

convents, monasteries, missions, and communities terminated their affiliation with the Synod.

The Synod made no effort to claim any property from nineteen of the twenty-one organizations which quit the Synod. The Synod asserted claims only against the Corporation and one other entity.

The 1987 meeting. On January 4, 1987, the members of the Corporation voted to amend their Articles of Organization so as to allow their By-laws to be amended without the consent of any third party. The members then voted to adopt revised By-laws which omitted mention of the Synod. Under the corporate laws of Massachusetts, these votes were lawful and proper.

Property ownership in the Russian Orthodox Church. The historical pattern of property ownership in the Russian Orthodox Church before the Bolshevik Revolution was described by an expert witness as a "mosaic" or "crazy quilt". The authorities of the central church owned some church buildings, but many were owned by tradesmen, by noblemen, by individual monasteries, by ambassadors, and by other private individuals. The three great cathedrals of the Kremlin are a prime example; they were part of a state palace, owned as private property by the imperial family.

The private owners of churches — tradesmen, noblemen, monks, ambassadors, and czars — accepted the jurisdiction of the bishops of the Russian Orthodox Church in ecclesiastical matters, but they retained private ownership of their church property. Each private property owner recognized that his bishop had the exclusive right to appoint clergy and to dictate the terms of worship, but the owner did not thereby surrender secular control of the property. Private ownership co-existed with episcopal authority in the same church building.

The same pattern which existed within Russia before the Revolution spread abroad after the Revolution. Among the

Russian Orthodox faithful outside Russia many church properties are privately owned. Bishops control the form of religious services in such churches, but do not control the property itself.

The dichotomy between private ownership and ecclesiastical jurisdiction formerly existed in the Roman Catholic Church, where it caused great controversy. From the late 18th century to the early 20th century, the Roman Catholic Church struggled with the situation. Eventually the Church established rigid canons which require the diocesan bishop to hold legal title to each church. In this way, ecclesiastical jurisdiction and secular ownership were united in the Roman Catholic Church. The Russian Orthodox Church never took this step.

The voluntary nature of Orthodox parish affiliations. The Russian Orthodox Church, like most Orthodox churches, is "intentional". In other words, the Orthodox faithful gather themselves together and form a parish group. Then they seek out a bishop and voluntarily affiliate themselves with him and his umbrella organization. As a consequence, there is much coming and going of parishes and clergy among Orthodox churches such as ROCOR.

ROCOR's dispute resolution procedure. ROCOR's Regulations establish a procedure for resolution of certain ecclesiastical disputes. According to the Synod's Secretary, however, ROCOR never has used its dispute resolution mechanisms in a case such as the present one.

The Synod's statement of the case.The Synod's statement of the case includes several assertions which warrant comment.

(a) *The ecclesiastical parish*. Pervading the Synod's petition is a profound misunderstanding: the Synod thinks that it sued only a parish. Throughout its petition the Synod refers to Respondents only as "the parish". The Synod never comes to grips with the fact that Respondents are a Massachusetts corporation and its board of directors.

A parish is a canonical entity, created and sustained by ecclesiastical authority. The primary defendant in the present

action, however, is not an ecclesiastical parish; it is a Massachusetts corporation, created and sustained by the civil laws of Massachusetts. The distinction between an ecclesiastical parish and a civil corporation is more than semantic. The Synod studiously ignores the distinction, apparently to avoid the awkward fact that the Corporation is an independent legal entity.

(b) *The Synod's polity*. The Synod repeatedly asserts that the Massachusetts courts have "transformed" ROCOR into a non-hierarchical church. The Synod complains, for example, that the Massachusetts courts "have imposed a congregational polity" on ROCOR. Petition 22.

The Synod's protests imply that the Massachusetts courts found or ruled that the organization of ROCOR is congregational. The implication is false. Nowhere in the three opinions of the Massachusetts courts is there any finding or ruling to the effect that ROCOR is congregational. The Massachusetts courts expressly acknowledged that ROCOR is hierarchical in matters of faith and practice. *Primate and Bishops' Synod* v. *Russian Orthodox Church of the Holy Resurrection, Inc.*, 418 Mass. 1001 (1994).

(c) *The "seizure"*. The Synod asserts that in 1987 the Corporation "seize[d]" (Petition 2) or "appropriat[ed]" (Petition 8, n.3) the church building. Nothing so colorful occurred. In fact, nothing at all occurred. Title to the property has not changed since the Corporation purchased the church in 1952, and the Corporation has had uninterrupted possession of the property since 1952.

(d) *The 1956 Regulations*. The Synod mistakenly asserts that the Corporation was organized under ROCOR's Regulations. Petition 2. Actually the Corporation was organized in 1952, four years before the Regulations came into being.

ARGUMENT

I. Granting the Petition Would Not Afford the Court an Opportunity to Revisit *Jones* v. *Wolfe*, Because the Massachusetts Courts Did Not Employ the Neutral Principles Doctrine.

According to the Synod, the issues presented by this case revolve around the merits and consequences of *Jones* v. *Wolfe*, 443 U.S. 595 (1979). The Synod contends that the present case illustrates widespread confusion and bias caused by *Jones'* approval of the neutral principles doctrine. The Synod's solution is simple: overrule *Jones*. Petition 9. That solution is academic, however, because the present case does not involve *Jones*. The Supreme Judicial Court did not employ the neutral principles analysis; it employed the traditional structural analysis.

Not all courts use the neutral principles analysis to settle church property disputes. The Constitution leaves the courts free to adopt any one of several approaches. *Jones* v. *Wolfe*, 443 U.S. at 602. Many courts use a method which has evolved from *Watson* v. *Jones*, 80 U.S. (13 Wall.) 679 (1872). This method classifies churches according to their hierarchical or congregational structure.

The courts have identified three points along the spectrum of church organizations. At one end of the spectrum is the true hierarchical type, exemplified by the Roman Catholic Church, in which the local church has no separate existence. At the other end of the spectrum is the true congregational type, in which the local church has no affiliation to any central authority. A third type occupies the middle of the spectrum; the local churches of this type accept a central authority in ecclesiastical matters but retain their independence in secular matters. *See, e.g., Antioch Temple, Inc.* v. *Parekh*, 383 Mass. 854, 860-62 (1981); *Maryland and Virginia Eldership* v. *Church of God at Sharpsburg*, 249 Md. 650, 664 (1968),

vacated and remanded, 393 U.S. 528 (1969), affirmed on remand, 254 Md. 162 (1969), appeal dismissed, 396 U.S. 367 (1970).

The Massachusetts courts traditionally have employed the hierarchical/congregational analysis to resolve church property disputes. Thus, in *Fortin* v. *Roman Catholic Bishop of Worcester*, 416 Mass. 781, 786, *cert. den.*, 114 S.Ct. 2164 (1994), the Court commented that "this court has, in the past, focused primarily on the distinction between hierarchical and congregational church structures . . .".

The Massachusetts courts have applied the neutral principles analysis as a rule of decision only once, and not in this case. "This court has never expressly taken the 'neutral principles of law' approach to a church property dispute." *Fortin*, 416 Mass. at 786. The Court applied that approach for the first and only time in *Fortin*.

The final state court decision in the present case was a rescript opinion of the Supreme Judicial Court, reported at 418 Mass. 1001 (1994), reviewing a decision of the Appeals Court, reported at 35 Mass. App. Ct. 194 (1993). A review of these decisions will demonstrate that the courts did not employ the neutral principles analysis.

In describing the issue presented on appeal, the Supreme Judicial Court made no reference to *Jones* v. *Wolfe* or the neutral principles doctrine. The Court observed that in the intermediate appellate court, the Synod had presented a narrow and specific issue for appellate review: "[t]he issue argued before the Appeals Court was that the judge's findings were clearly erroneous." 418 Mass. at 1001.

This was a fair summary. The Synod presented no constitutional issue to the Appeals Court, nor did it question the wisdom of *Jones*. It argued only that the trial judge's key findings were clearly erroneous. The Appeals Court itself described the Synod's appeal as follows:

> The Church has appealed, claiming that the finding that the parish is congregational as to the ownership and control of its property is clearly erroneous. . . .

35 Mass. App. Ct. at 195. This appellate issue has nothing to do with the neutral principles analysis of *Jones* v. *Wolfe*. It concerns only the hierarchical/congregational analysis, pursuant to which the trial judge found the Corporation to be hierarchical in matters of faith and practice but congregational in terms of property ownership. Petition 21a.

The opinion of the Supreme Judicial Court does not even cite *Jones* v. *Wolfe*. The Court employed as a rule of decision only its traditional hierarchical/congregational analysis, focusing upon the Synod's argument that key findings of fact were clearly erroneous. "Our review of the record brings us to the same conclusion, namely, that the judge's findings of fact were not clearly erroneous and hence must stand." 418 Mass. at 1001. Neither *Jones* nor the neutral principles approach were at issue.[1]

The Supreme Judicial Court concluded its opinion by affirming the judgment "for the reasons stated in the opinion of the Appeals Court". 418 Mass. at 1002. The Appeals Court's opinion therefore is relevant to this Court's decision on the Synod's petition.

The Appeals Court did not employ the neutral principles approach. The Court analyzed and decided the case entirely under the traditional hierarchical/congregational approach. 35 Mass. App. Ct. at 195-200. The Court mentioned neutral principles only in a footnote, observing that under the neutral principles approach "we would reach the same result as we reach under the traditional principles . . .". 35 Mass. App. Ct. at 196, n.3.

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[1] The Court invoked *Jones* only to point out that the neutral principles approach would have produced the same result as the structural approach. 418 Mass. at 1002.

By granting the Synod's petition, therefore, this Court would achieve nothing. Since the Massachusetts courts did not rely upon the neutral principles approach, this Court cannot use the present case to clarify *Jones*. The ony question presented to this Court is whether the Supreme Judicial Court correctly held that trial court's findings of fact were not clearly erroneous. In answering such a question, this Court would have no occasion to revisit *Jones*.[2]

A related reason for denying the petition is that no clarification of *Jones* by this Court would affect the outcome of this action. Both the hierarchical/congregational analysis and the neutral principles analysis would produce the same judgment in this case. *See Primate and Bishops' Synod*, 418 Mass. at 1002; 35 Mass. App. Ct. at 196, n.3. Even an outright overruling of *Jones*, therefore, would amount to nothing more than an advisory opinion.

II. The Judgment Below Does Not Conflict With Prior Decisions of This Court or Any State Court of Last Resort.

The Synod spends most of its energy attempting to portray the "chaos and confusion" which *Jones* allegedly has caused in the lower courts. Petition 12. The portrayal is irrelevant, since the present action does not involve *Jones*. Respondents therefore will not detain the Court with a discussion of how *Jones* has affected the Presbyterian and Episcopalian churches.[3] Respondents will address briefly, however, the Synod's references to Rules 10.1(b) and 10.1(c). Petition 13.

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[2] In other words, this case presents no substantial federal question. *See Maryland and Virginia Eldership*, 396 U.S. at 368 (appeal dismissed for want of substantial federal question).

[3] Respondents do not share the Synod's stated fear that *Jones* will transform Presbyterians and Episcopalians into "quasi-Baptists". Petition 23.

The judgment below does not conflict with applicable decision of this Court. *See* Rule 10.1(c), Rules of the Supreme Court of the United States. To demonstrate a conflict, the Synod cites only two cases, *Kedroff* v. *St. Nicholas Cathedral of the Russian Orthodox Church in North America*, 344 U.S. 94 (1954), and *Serbian Eastern Orthodox Church* v. *Milivojevich*, 426 U.S. 696 (1976)., According to the Synod, both cases "assume correctly that the polity of these religious organizations is hierarchical". Petition 13.

It surpasses irony for the Synod to rely upon *Kedroff* for proof of its hierarchical stature, because ROCOR was the losing party in that case. *See Kedroff*, 344 U.S. at 105. Leaving that factor aside, the case does not stand for the Synod's proposition.

The classification of a church as hierarchical or congregational is a question of fact. *See Antioch Temple, Inc.* v. *Parekh*, 383 Mass. at 862. Thus, the *Kedroff* court's characterization of ROCOR as "hierarchical" has no probative value in this action. Neither party in *Kedroff* contested the characterization, because both parties were hierarchies; ROCOR's structure was neither litigated nor decided. This Court simply assumed that both ROCOR and its protagonist, the Moscow Patriarchate, were hierarchical. Furthermore, *Kedroff* did not touch upon the relationship between ROCOR and its member churches. No local church was a party.

Kedroff arose from a dispute over the appointment of a bishop. Respondents never have questioned the Synod's hierarchical authority with respect to such canonical matters as the appointment of a bishop. Respondents have argued only that the Synod's ecclesiastical authority does not extend to secular ownership and control of property purchased by local church organizations which voluntarily have become affiliated with ROCOR. This issue was absent from *Kedroff*, which was not a church property case. The case was "strictly a matter of ecclesiastical government." *Kedroff*, 344 U.S. at 115. It is of

no consequence, therefore, that this Court assumed the Russian Orthodox Church to be a "hierarchical" church. *Kedroff*, 344 U.S. at 101.

The Court held in *Kedroff* that a state could not intervene legislatively to determine which of two competing bishops was the true bishop. *Kedroff*, 344 U.S. at 117-19. In *Serbian Eastern Orthodox Diocese* v. *Milivojevich*, 426 U.S. at 698, the Court held that a state could not achieve the same result by intervening judicially.

The Synod cites *Milivojevich* because this Court referred to the Serbian Eastern Orthodox Church as "hierarchical". *Id.* at 699. The reference has no bearing on the present case, because (1) the present case does not involve the Serbian Eastern Orthodox Church, (2) the characterization of the church's structure was not contested, (3) the case was not a property dispute, and (4) no local church was involved.

The goal of the Synod's argument, of course, is to establish that this Court has held ROCOR to be hierarchical, while the Supreme Judicial Court has held the opposite. The argument overlooks a basic truth of the present action: the Supreme Judicial Court did *not* find ROCOR to be non-hierarchical. The Court agreed with the trial court's finding that ROCOR *is* hierarchical in matters of faith and polity. 418 Mass. at 1001. The Court's ruling of congregationality applies only to the Corporation, not to ROCOR. *Id.* Contrary to the Synod's assertion, therefore, the Massachusetts courts have not transformed the members of the Synod into Baptists or Congregationalists. Petition 25.

The Synod also argues that the judgment below conflicts with decisions of other state courts of last resort. Petition 13; *see* Rule 10.1(b), Rules of the Supreme Court of the United States. For that proposition the Synod cites two cases, *Draskovich* v. *Pasalich*, 280 N.E.2d 69, 79 (Ind. App. 1972), and *Piletich* v. *Deretich*, 328 N.W.2d 696, 699 (Minn. 1982). Both

cases arose from the defrockment of Bishop Dionisije Milivojevich and the reorganization of his diocese, as did *Serbian Eastern Orthodox Diocese* v. *Milivojevich*, 426 U.S. 696 (1976).

Rule 10.1(b), by its express terms, covers the situation where two state courts have rendered conflicting decisions on the same federal question. The only federal question addressed in both *Draskovich* and *Piletich* was whether the civil courts have jurisdiction to decide the propriety of a diocesan reorganization. The Indiana and Minnesota courts gave the same negative answer. *Draskovich*, 280 N.E.2d at 79; *Piletich*, 328 N.W.2d at 699. This Court later agreed. *Milivojevich*, 426 U.S. at 721. The present case presents no such question.

The Synod tries to finesse Rule 10.1(b) by arguing that the present case is in conflict with (1) *Draskovich's* determination that the Serbian Eastern Orthodox Church is entirely hierarchical and (2) *Piletich's* determination that the Serbian church is not hierarchical with respect to control of local property. *Draskovich*, 280 N.E.2d at 81; *Piletich*, 326 N.W.2d at 699-700.

Among the many flaws in the Synod's argument, the most glaring one is the fact that the present case involves the Russian Orthodox Church, not the Serbian Eastern Orthodox Church. The Serbian church functions under national and diocesan constitutions which bear little apparent resemblance to ROCOR's Regulations. *See Draskovich*, 280 N.E.2d at 72-74 (diocesan constitution), 74-76 (national constitution). The governing documents of the local churches which were involved in *Draskovich* and *Piletich* also appear to differ substantially from those of the Massachusetts corporation. Because the fundamental facts of *Draskovich* and *Piletich* differ so much from those of the present case, it cannot be said that there is *any* conflict, much less a federal question conflict, between the present case and the other two.

Conclusion.

Since this case does not involve *Jones* v. *Wolfe*, it cannot serve as a vehicle for the Court to revisit *Jones* v. *Wolfe*. The Supreme Judicial Court's decision represents a mainstream application of the traditional hierarchical/congregational analysis, with no constitutional implications. Finally, the Massachusetts decision does not conflict with decisions by this Court or by state courts of last resort. The Synod's petition should be denied.

Respectfully submitted,

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Petitioner,

v.

THE RUSSIAN ORTHODOX CHURCH OF THE HOLY RESURRECTION, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari
To The Supreme Judicial Court Of Massachusetts

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* AND BRIEF *AMICI CURIAE* OF JAMES ANDREWS AS STATED CLERK OF THE GENERAL ASSEMBLY OF THE PRESBYTERIAN CHURCH (U.S.A.), ORTHODOX CHURCH IN AMERICA, NATIONAL COUNCIL OF CHURCHES OF CHRIST IN THE U.S.A., GREEK ORTHODOX ARCHDIOCESE OF NORTH AND SOUTH AMERICA, ANTIOCHIAN ORTHODOX CHRISTIAN ARCHDIOCESE OF NORTH AMERICA, GENERAL CONFERENCE OF SEVENTH-DAY ADVENTISTS, AND CHRISTIAN LEGAL SOCIETY IN SUPPORT OF THE PETITION FOR CERTIORARI

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On Petition For A Writ Of Certiorari To The Supreme Judicial Court Of Massachusetts

MOTION OF PRESBYTERIAN CHURCH (U.S.A.) *ET AL.* FOR LEAVE TO FILE A BRIEF *AMICI CURIAE*

The Presbyterian Church (U.S.A.), the Protestant Episcopal Church in the United States of America and other churches have been losing parishes to breakaway congregations because of the refusal by lower courts to enforce the denomination's right to retain local church property. This has come about because of this Court's decision fifteen years ago that courts could use "neutral principles of law" to decide ecclesiastical disputes over ownership of church property. But those principles have proved in many instances to be "neutral" in favor of

congregationalizing hierarchical polities, contrary to the church's own self-definition.

Repeatedly, lower courts have construed clear and express provisions in church law prohibiting the alienation of church property without the consent of hierarchical authorities as being mere moral and spiritual guidance without legal force or effect on temporal control of property. The instant case is just such an example of judicial disregard of explicit church law and provides this Court an opportunity to clarify and correct the lower courts' (mis)understanding of the right of hierarchical churches to control their subordinate entities in property as in all other matters.

Pursuant to Rule 37 of this Court, *amici curiae* James Andrews as Stated Clerk of the General Assembly of the Presbyterian Church (U.S.A.), Orthodox Church in America, National Council of Churches of Christ in the U.S.A., Greek Orthodox Archdiocese of North and South America, Antiochian Orthodox Christian Archdiocese of North America, General Conference of Seventh-day Adventists, and Christian Legal Society move for leave to file the attached brief *amici curiae*.

Petitioner the Primate and Bishops' Synod of the Russian Orthodox Church Outside of Russia consented to the filing of this brief *amici curiae*, but respondents the Russian Orthodox Church of the Holy Resurrection, *et al.*, Dale Harger, Counsel, refused to consent. Petitioner's letter of consent has been lodged with the Court.

Because of their victimization in church property disputes and because of their long involvement in issues of religious liberty, these *amici curiae* are able to provide the

Court a unique and seasoned perspective on how the courts in a number of states have trampled on *amici's* protected autonomy over church governance. *Amici* have not merely repeated the arguments made in the petition, but rather have explained their church polity and how the present state of the law fosters unwarranted government intrusion upon church autonomy, as this case and too many others demonstrate.

Respectfully submitted,

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INTERESTS OF *AMICI CURIAE*

The Presbyterian Church (U.S.A.), the Protestant Episcopal Church in the United States of America and other churches have been losing parishes to breakaway

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Repeatedly, lower courts have construed clear and express provisions in church law prohibiting the alienation of church property without the consent of hierarchical authorities as being mere moral and spiritual guidance without legal force or effect on temporal control of property. The instant case is just such an example of judicial disregard of explicit church law and provides this Court an opportunity to clarify and correct the lower courts' (mis)understanding of the right of hierarchical churches to control their subordinate entities in property as in all other matters.

The *amici curiae* joining this brief are religious denominations and organizations committed to the principles of religious liberty and governmental non-interference in religious affairs.[1] Because of that commitment, each of the *amici* is deeply disturbed by the judgment of the Massachusetts state courts in this case, under which a historically hierarchical church has been transformed into a congregationally controlled organization with respect to church property, in violation of both the traditions and governing documents of the larger church and of the particular parish.

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[1] The precise interest of each *amicus* is set forth in the Appendix to this brief.

Amici include religious denominations that are structured in a hierarchical manner similar to that of petitioner and that have been ravaged by courts below due to the lack of clear direction from this Court in this area. *Amici* also include a civil rights organization dedicated to the advocacy of strong protection for the first of our civil liberties, religious freedom. The *amici* are thus in a position to suggest to this Court a significant point that appears to have escaped the attention of the Massachusetts courts: theological convictions have a direct and powerful bearing on the structures and forms of ecclesiastical governance. Notwithstanding the important differences among the *amici* – indeed, precisely because of these significant theological differences – all of the *amici* have a strong interest in keeping the government out of affairs that are beyond its jurisdiction and literally none of its business.

ARGUMENT

This case vividly exemplifies a disturbing trend among state courts that are deciding disputes over church property in the light of the Religion Clause of the First Amendment. The problem concerns religious bodies that are organized along "hierarchical" lines, that is, where the local religious congregation "is but a subordinate member of some general church organization in which there are superior ecclesiastical tribunals with a general and ultimate power of control." *Watson v. Jones*, 80 U.S. (13 Wall.) 679, 722 (1871). As the Petition for Certiorari details, such hierarchically organized religious bodies have been unable to rely on the courts to provide consistent enforcement of their chosen structures. State courts have issued conflicting decisions as to whether the property belongs to the national church or to a breakaway local congregation, and far too often they have awarded

the property to the breakaway congregation in violation of the governance structure and arrangements of the church.

As set forth below and in the Petition, the inconsistency has arisen partly because courts adhere to two different approaches to resolve intra-church property disputes: the "polity" approach, under which the court identifies whether the religious body is hierarchically or congregationally organized and then defers to the decision of the authoritative body under each of those structures; and the "neutral principles" approach, under which the court applies principles of trust, property, or other law to the deeds, church documents, and other relevant materials in the intra-church dispute. In *Jones v. Wolf*, 443 U.S. 595, 602 (1979), this Court held that a state may adopt either of these "approaches for settling church property disputes so long as it involves no consideration of doctrinal matters." However, as detailed below, even courts applying the "neutral principles" approach have failed to reach consistent results concerning hierarchically organized churches.

Amici agree that the issues presented in this case cannot be permitted "to ripen further before resolution by this Court," but constitute "a grave constitutional violation." Pet. 23. We also agree with the Petition's contentions of law: at the very least, this Court should give guidance to state courts applying the "neutral principles of law" approach; but if the self-understanding of a religious community cannot be respected under that approach, the Court should disapprove of it and reverse the holding in *Jones v. Wolf*.

To this Court's deliberation on the Petition *amici* bring the perspective of other denominational victims of lower court adventurism in church property disputes. Inconsistent decisions among state courts of last resort

present an intolerable situation for hierarchically organized churches and therefore make review by this Court necessary. *See* Sup. Ct. R. 10.1(b). Questions of church structure and polity, for many religious bodies, involve far more than simple convenience or efficiency: they rest on deeply held theological and doctrinal beliefs that are protected by the Religion Clause from government interference.

This case exemplifies the chief reasons why courts have failed to respect the arrangements of hierarchically organized religious bodies (even arrangements clearly reflected in the body's governing documents): a tendency to ignore those documents in favor of purely "secular" instruments such as deeds, and a misuse and misreading of other evidence concerning the dealings between a national church and a local congregation. Accordingly, this case is an apt vehicle for this Court to clarify the law and protect the constitutional rights of religious groups.

A. The Decision Below And Decisions Like It Seriously Burden Religious Freedom By Interfering With Doctrinally-Based Decisions Concerning Church Structure And Governance

Unlike many other collective entities, churches do not simply choose their organizational structures for reasons of efficiency or bureaucratic ease. Instead, such structure (or "polity") is, in many cases, "an expression of deeply held convictions of a faith community about their understanding" of the nature of their faith. Pet. 25 n.18. As a consequence, when courts unthinkingly override the polity of a hierarchical body, the community self-understanding that is violated is a *religious* one. For that reason, this Court has long recognized that the Free Exercise Clause must guarantee religious organizations "power to

decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine." *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94, 116 (1952); *see also Employment Division v. Smith*, 494 U.S. 872, 877 (1990) (court may not "lend its power to one or the other side in controversies over religious authority or dogma"). We wish to illustrate this point not only with respect to the Russian Orthodox Church Outside Russia, but also with respect to two other hierarchically organized churches, the Protestant Episcopal Church in the USA (hereafter "the Episcopal Church") and the Presbyterian Church (U.S.A.) (or the "PC(USA)").[2]

The structure of the Russian Orthodox Church Outside Russia – hierarchical, with control by bishops over both discipline and property – is not unlike that of the Episcopal Church, which (like other members of the world-wide Anglican communion) is also hierarchical. That structure is reflected explicitly in provisions of church canon law concerning both matters of faith and matters of property and other business. The canon law states that "[a]ll real or personal property held by or for the benefit of any Parish, Mission or Congregation is held in trust for [the Episcopal] Church and the Diocese

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[2] These bodies, both of which are members of the National Council of Churches of Christ in the U.S.A. and will be adversely affected if the judgment below and others like it are allowed to stand, together count more than 6 million members. *See Yearbook of American and Canadian Churches* 256, 258 (1994) (listing 2.5 million members in Episcopal Church and 3.7 million in PC(USA)). When other similarly organized churches are considered, the importance of this issue in sheer numbers is apparent.

thereof"; a local parish or mission may exercise authority over the property only "so long as [it] remains a part of, and subject to, th[e] Church and its Constitution and Canons." *Constitution and Canons for the Government of the Protestant Episcopal Church in the USA*, Title I, Canon 7, Section 4, at 34 (1985). Moreover, no local parish body "authorized by Civil or Canon law to hold, manage, or administer real property for any Parish . . . shall encumber or alienate [the property] without the written consent of the Bishop and Standing Committee of the Diocese." *Id.*, Title I, Canon 7, Section 3. The same trust provisions and limits on local parish authority apply to "dedicated and consecrated" churches and chapels. *Id.*, Title II, Canon 7, Sections 1-4, at 56.

In both the Orthodox and the Episcopal churches, the placing of authority in the bishop reflects the theological notion of "apostolic succession," or the "historic episcopate" – the continuity between the first apostles and today's church. Indeed, the Orthodox and Episcopal churches, in ecumenical discussions on the meaning of their common "episcopal" polity, agree that "[t]he apostolicity of the Church is manifested in a particular way through the succession of bishops. This succession is a sign of the unbroken continuity of apostolic tradition and life." *Dublin Agreed Statement of 1984*, § 17, *quoted in On Being a Bishop: Papers on Episcopacy from the Moscow Consultation* 43 (R. Wright ed. 1993). As the Petition for Certiorari (at 25 n.18) notes, "if one believes that Christ's authority and teaching pass down through apostolic succession, then one does not let a congregation take votes on these matters."

Moreover, to those bodies organized on episcopal terms, the "historic episcopate" is an expression of the unity of the church. These bodies take seriously the statement of St. Ignatius in the second century: "Take care,

then, to partake of one Eucharist; for one is the flesh of our Lord Jesus Christ, and one the cup to unite us with his blood, and one altar, *just as there is one bishop* assisted by the presbyter and deacons." St. Ignatius, *Smyrna* 7,1, *reprinted in* R. Wright, *On Being a Bishop, supra, id.* at 41. Thus, the 1979 *Book of Common Prayer* for the Episcopal Church states that the bishops "carry on the apostolic work of leading, supervising, and uniting the Church." *Book of Common Prayer* 510 (1979); *see also id.* at 517, 855 (admonishing newly ordained bishops to "guard the faith, unity, and discipline of the whole Church").

The polity of the Presbyterian family of religious bodies similarly rests on theological affirmations. The largest Presbyterian denomination, the Presbyterian Church (U.S.A.), explicitly provides for the authority of higher tribunals over matters of both faith and property. The PC(USA) *Book of Order* states that "[a]ll property held by or for a particular church," wherever legal title is lodged, "is held in trust nevertheless for the use and benefit of the Presbyterian Church (U.S.A.)." *Constitution of the Presbyterian Church (U.S.A.) – Part II: Book of Order* G-8.0201 (1994). Consequently, "[w]henever property of, or held for, a particular church . . . ceases to be used by that church . . . in accordance with [the PC(USA)] Constitution," such property shall be held, used, applied, transferred, or sold as provided by the presbytery." *Id.* G-8.0301. And a local church seeking to sever its ties with the denomination may do so "only by constitutional action on the part of the presbytery." *Id.* G-8.0601.

The distinctive Presbyterian form of governance likewise is tied to deep religious tenets. The General Assembly, the highest ruling body of the PC(USA), has emphasized that

> [t]he basis of Presbyterian polity is theological. Our polity is not just a convenient way of getting things done; rather, it is the ordering of our

> corporate life which expresses what we believe. The connection between faith and order is inseparable. At its heart, the polity of our church expresses our Reformed theology. What we do and the way we do it is an expression of how we understand our faith.

195th General Assembly of the Presbyterian Church in the United States of America, *Historic Principles, Conscience, and Church Government* (1983), *quoted in* McCarthy, *The Emerging Importance of Presbyterian Polity*, in *The Organizational Revolution: Presbyterians and American Denominationalism* at 279, 302 (M. Coalter, J. Mulder & L. Weeks eds. 1992).

The Presbyterian polity – with tribunals that are representative in nature exercising authority over subordinate entities – stems back to the teachings of John Calvin and the "Ecclesiastical Ordinances" he instituted in Geneva. After setting forth the various ministerial offices, Calvin described this "order of church government as delivered to us in the pure word of God, and . . . instituted by Christ." 2 John Calvin, *Institutes of the Christian Religion* 327 (H. Beveridge trans. 1845); *see generally id.* Book IV, chs. III-V. The Westminster Assembly of 1643 to 1645, whose creeds and confessions have directed much of Presbyterian life for centuries, stated that "[i]t is lawful, and agreeable to the Word of God, that the church be governed by several sorts of assemblies, [including] presbyteries and synods" and that "appeales be made from the inferior to the superior respectively." *Westminster Assembly Directory for Church Government, reprinted in Paradigms in Polity: Classical Readings in Reformed and Presbyterian Church Government* at 263, 268 (D. Hall & J. Hall eds. 1994).

In setting forth these doctrinal bases for the hierarchical organization of certain religious bodies, we *do not* suggest that courts must interpret religious doctrines in

order to find that a group has such a hierarchical polity. Cf. *Jones*, 443 U.S. at 602, 604 (forbidding such inquiries); *Presbyterian Church v. Hull Church*, 393 U.S. 440, 449-450 (1969) (same). The hierarchical nature of these communities is evident from the specific secular terms in the governing documents as well as the overall structure of those documents. We cite the doctrinal bases only to emphasize that to disregard and trample upon a hierarchical polity bars a group from following its "sincere religious beliefs" and thus imposes a "significant" burden on the free exercise of religion. *Jimmy Swaggart Ministries v. Board of Equalization*, 493 U.S. 378, 391-392 (1990).

B. The Lower Courts Are In Confusion As To How To Resolve Church Property Disputes Within Hierarchically Organized Religious Bodies

In spite, however, of the clear language cited above in the organic documents, hierarchically organized churches have been unable to rely on the courts to provide consistent enforcement of the form of organization they have chosen. This case dramatizes the problem with respect to Orthodox churches (here, the Russian Orthodox Church Outside Russia). And cases involving the Presbyterian Church (U.S.A.) and its predecessors[3] and the Episcopal Church present the same inconsistency and uncertainty. A number of courts have refused to enforce the hierarchical polity of these bodies. *See* cases discussed

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[3] The PC(USA) was formed in 1983 by the reunion of the United Presbyterian Church in the USA (UPCUSA) and Presbyterian Church in the US (PCUS). Several previous cases discussed here involved the UPCUSA, which had similar provisions in its *Book of Order* to those of the PC(USA).

in the Petition for Certiorari at 16-17 (Presbyterian churches), 18-20 (Episcopal churches).[4]

As the petition shows, some courts have recognized the authority of higher church bodies over church property. *See* cases cited in Petition at 15 (Orthodox churches), 17 (Presbyterian churches), 20-21 (Episcopal churches). The upshot of this chaotic state of the law is that these nation-wide denominations, and others with hierarchical structures, now face a "patchwork" of conflicting decisions in various states, in an area that calls out for certainty so as to avoid chilling First Amendment rights. This Court's intervention is needed. Sup. Ct. R. 10.1(b).

Several years ago, a survey of the law governing church property disputes since *Jones v. Wolf* concluded that the cases have been shot through with "inconsistency and unpredictability." William G. Ross, *The Need for An Exclusive and Uniform Application of "Neutral Principles" in the Adjudication of Church Property Disputes*, 32 St. Louis U.L.J. 263, 305 (1987).[5] As Professor Ross noted, the *Jones* decision prompted many critics to suggest that the Court needed to give "clearer guidance to lower courts" and thus "that the Court would need to re-visit the question of church property dispute resolution in the near future." *Id.* at 265. For fifteen years now, however, "the state courts have navigated the treacherous waters of church property disputes without additional guidance from" the

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[4] We discuss the specific reasons for the failure to give consistent respect to hierarchically organized churches *infra* in part C (pp. 14-19).

[5] While we disagree with that article's ultimate judgment that "neutral principles" analysis should be applied exclusively (*id.* at 305-316), we agree with its characterization of the uncertainty in the existing law and its recommendation that, if courts are to apply "neutral principles," they should do so in a consistent manner.

Court. *Id.* The results – that "inconsistency and unpredictability abound" – are even clearer, and more distressing, than in 1987.

Moreover, the consequences are important to religious bodies throughout the United States:

> The law would better serve the needs of both national denominations and their local congregations if both sides were able to make more accurate predictions about the outcome of property disputes. National churches, for example, could better evaluate the consequences of controversial pronouncements on social and doctrinal issues. Members of congregations, in turn, could better measure the prudence of voting to withdraw from the parent body.

Id. at 305.

In short, there is an urgent need for this Court, a decade and a half after *Jones v. Wolf*, to return to this area and provide guidance on the proper means of resolving church property disputes. Moreover, the primary problem in this area is that identified by the Petition for Certiorari: the tendency of state courts to disregard the hierarchical structure of a religious body – *even as explicitly set forth in the governing documents of the church* – and to award property to a breakaway local congregation.

C. The Decision In This Case Exemplifies The Means By Which Courts Have Overridden The Structure Of Hierarchical Religious Bodies, In Violation Of This Court's Directions

This case presents a textbook example of the means that state courts have used to disregard the hierarchical structure of a religious body and impose a congregational polity on it in violation of its deeply held religious tenets. Therefore, this case presents an apt vehicle for correcting the recurring errors and confusion in this area.

The Massachusetts Appeals Court (whose reasoning was adopted by the Supreme Judicial Court, Pet. App. 3a) recognized that the explicit language of both the general Church documents and the parish by-laws "provide considerable force to the Church's position" that it "had control over the Parish's property," especially the church building and real estate. Pet. App. 8a.[6] Nevertheless, the court overrode these documents on the basis of parol evidence, "particularly of the considerable movement in and out of the Church by individual parishes who took with them their own property without claim by the Church." Pet. App. 11a.[7]

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[6] As the Appeals Court noted, these explicit provisions state among other things that the diocesan bishop "administers and disposes of diocesan and monastic property and supervises all other church property in the diocese, in accordance with the 41st Apostolic canon: 'We command that the Bishop have authority over the property of the church.' " Regulation 47-18 (quoted at Pet. App. 8a; reprinted at Pet. App. 34a). The parish by-laws provide that "church property" includes "[t]he church building with all its appurtenances" (By-Laws § 44(a), Pet. App. 42a); and that "[t]he sale of church real estate, its alienation, exchange or cession for building purposes, shall be effected subject to the authorization of the Bishops' Synod." By-Laws § 53, Pet. App. 44a. Any amendment of the By-Laws and any closing of the parish are likewise subject to the approval of the Bishops' Synod. By-Laws §§ 54, 56, Pet. App. 44a.

[7] We agree with petitioner (Pet. 8 n.3) that the state appellate courts should have conducted an independent review of the trial judge's conclusion that the Church was "congregational" with respect to property issues, rather than accepting that conclusion as "not clearly erroneous" (Pet. App. 2a; Pet. App. 9a, 11a). Permitting questions with such import for the Religion Clause to be left to the discretion of trial courts – or presumably in some cases, juries – is a recipe for the kind of inconsistency that marks this area. The very purpose of the independent appellate review mandated in *Bose Corp. v. Consumer's Union,*

In addressing the following errors in the state court decisions, we agree with the legal arguments presented by petitioner in response to those errors. First, at the very least, this Court should instruct state courts applying the "neutral principles of law" approach (permitted in *Jones v. Wolf*) that they must give effect to the language and structure of the governing documents of the general church. As we will show, to fail to give effect to such documents violates the clear teachings of this Court on this important issue of federal law. *See* Sup. Ct. R. 10.1(c). More broadly, however, the Court should reject the use of "neutral principles" of law, at least when they are applied to override the hierarchical nature of a church as is shown in the governing documents.

1. ***Ignoring the Church's Organic Documents.*** The primary reason why some state courts have failed to respect the hierarchical polity of religious bodies is precisely what happened in this case: the courts ignore the governing church constitutions and canons in favor of a focus on purely secular documents such as property deeds, or on ill-defined inquiries into a "course of conduct."

In *Bjorkman v. Protestant Episcopal Church*, 759 S.W.2d 583 (Ky. 1988), for example, the Kentucky Supreme Court simply refused to follow the provision of canon law, as well as an instrument of donation from the local parish, that prohibited encumbrance or alienation of church property without the bishop's consent. *Bjorkman*, 759 S.W.2d at 586 (dismissing both provisions as "of moral value *only* and without legal effect"). This refusal was essential to the court's conclusion that the local parish

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466 U.S. 485, 499 (1984), and *New York Times v. Sullivan*, 376 U.S. 254, 284-286 (1964), is to ensure consistent protection of First Amendment rights.

"was at all times in control of its temporal affairs" such as property (*id.* at 587). Likewise, in *Presbytery of Beaver-Butler v. Middlesex Presbyterian Church*, 507 Pa. 255, 489 A.2d 1317, 1325, *cert. denied*, 474 U.S. 887 (1985), the court looked solely at provisions in the deeds in awarding property to the local church, and dismissed provisions in the *Book of Order* as merely "a means of overseeing the *spiritual* development of member churches" (emphasis in original).

The same splitting of a hierarchical church into "spiritual" and "temporal" authority appears in this case. The Supreme Judicial Court affirmed the finding that "although [the general Church] and the defendant parish were hierarchical in matters of faith and polity, the defendant parish was congregational in terms of property ownership." Pet. App. 2a.

By contrast, as discussed in greater detail below, courts that have given effect to the provisions in the general church constitution or canons have found that these provisions gave the general church control over matters of property as well as matters of faith and doctrine.

Undoubtedly, one factor in determining whether a court gives effect to provisions in the larger church's governing documents is whether the court applies the "polity" approach or the "neutral principles" approach. Courts that seek to determine the nature of the polity in order to defer to the authoritative intra-church resolution have uniformly concluded that the Orthodox, Episcopal, and Presbyterian churches are hierarchical, based on the specific language and overall structure of the organic documents. *See, e.g., Draskovich v. Pasalich*, 151 Ind. App. 397, 280 N.E.2d 69 (1972) (Serbian Eastern Orthodox Church); *Tea v. Protestant Episcopal Church*, 96 Nev. 399,

610 P.2d 182 (1980) (Episcopal Church); *Calvary Presbyterian Church v. Presbytery of Lake Huron*, 148 Mich. App. 105, 384 N.W.2d 92, 94-95 (1986) (UPCUSA). The only cases in which courts have disregarded language in the organic documents are cases applying the "neutral principles of law" approach. Thus, some confusion is almost guaranteed to remain as long as this Court continues to permit states to "adopt *any* one of various approaches for settling church property disputes." *Jones*, 443 U.S. at 602 (emphasis in original; quotation omitted). For that reason, we agree with the Petition that this aspect of *Jones v. Wolf* should be overruled and the "polity" approach be adopted uniformly.

However, even if this Court determines that the "neutral principles of law" approach remains appropriate, the Court must correct the state courts' lack of respect for governing church documents, because that lack of respect also has undermined consistent application of the neutral principles approach. Although *Jones v. Wolf* instructed courts applying neutral principles to look to "the provisions in the constitution of the general church concerning the ownership and control of church property" (443 U.S. at 603), state courts since *Jones* – including the Massachusetts courts here – have failed to follow that directive consistently. This Court's review is necessary to ensure that the analysis prescribed in *Jones* is followed. *See* Sup. Ct. R. 10.1(c).

For example, the *Bjorkman* decision dismissed the Episcopal Church constitution and canons under the neutral principles analysis (759 S.W.2d at 586), just as the Massachusetts courts here overrode the governing documents of the Russian Orthodox Church Outside Russia. On the other hand, several other cases applying "neutral principles" to Episcopal parishes have enforced those

provisions. *See, e.g., Rector, Wardens, and Vestrymen v. Episcopal Church*, 224 Conn. 797, 821-822, 620 A.2d 1280, 1292 (1993); *Bishop and Diocese of Colorado v. Mote*, 716 P.2d 85, 105-107 (Colo. 1986); *Protestant Episcopal Church v. Graves*, 83 N.J. 572, 417 A.2d 19, 24 (1980).[8]

Likewise, several courts applying the "neutral principles" analysis to Presbyterian documents have refused to give effect to provisions in the *Book of Order*, particularly the provision that prohibits the selling or encumbering of church property without approval of the Presbytery. *See, e.g., Presbytery of Beaver-Butler, supra; Presbytery of Elijah Parish Lovejoy v. Jaeggi*, 682 S.W.2d 465, 474 (Mo. 1984) (rejecting that provision as inapplicable); *York v. First Presbyterian Church of Anna*, 130 Ill. App. 3d 611, 474 N.E.2d 716 (1984) (simply ignoring that provision). But in *Babcock Memorial Presbyterian Church v. Presbytery of Baltimore*, 296 Md. 573, 464 A.2d 1008, 1016-1017 (1983), the court, applying "neutral principles" analysis, enforced the provision prohibiting sales or encumbrances and thus awarded the property to the denomination.

Even the explicit trust and property provisions adopted by some religious bodies and set forth above (pp. 6-10) have been cast into doubt by the decision and reasoning of the Massachusetts courts in this case. The regulations of the general Church and the by-laws of the Holy Resurrection Parish are quite explicit in providing that the diocesan bishop "disposes of" and "supervises" church property, and that any alienation of church property, as well as any amendment of the by-laws, must be

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[8] Each of these cases also concluded that the express canon law provisions reflected or confirmed the "established customs, practices and usages" of the Church providing for general church control over property. *Mote*, 716 P.2d at 105 n.15; *Graves*, 417 A.2d at 24; *accord Rector, Wardens and Vestrymen*, 620 A.2d at 1292.

approved by the Bishops' Synod. *See supra* p. 13 n.6. While admitting that these provisions have "considerable force" (Pet. 8a), the Massachusetts courts overrode them on the basis of vague testimony concerning the "course of conduct" in this Church and other Orthodox bodies. (We discuss this "course of conduct" testimony in the next section.) Given the propensity that courts have already shown to limit church constitutions and canons to merely "moral" exhortations or "spiritual" matters, the decision and reasoning in this case will likely encourage further disregard of religious bodies' organic documents.

2. ***Misreading of Evidence Concerning "Course of Conduct."*** The state court decisions in this case also exemplify a second recurring source of confusion and error: the tendency of some courts to elevate vague and selective testimony about the "course of conduct" in a religious body above the governing documents.

The Appeals Court here relied heavily on open-ended testimony about a "crazy quilt" of property ownership in the prerevolutionary Russian Orthodox Church, including ownership by "tradesmen, nobles, and the Tsars." Pet. App. 9a. The Petition, however (at 29 n.24), points out the obvious irrelevance of government ownership of churches under American conditions of disestablishment. More to the point, the Appeals Court noted that the parish paid for and managed the property (Pet. App. 9a), but it ignored other elements of the relationship between the parish and the general Church. This selective examination of the dealings between the parties – selectively favoring the claim of the local congregation – is, again, typical of courts that disregard hierarchical church polities. In *Bjorkman*, for example, the majority disregarded evidence that the local parish "enjoyed the benefits of membership in the PECUSA for many long years," including insurance on the church property purchased,

participation of the parish clergy in the denominational pension plan, and regular "help and advice" from the diocesan bishop. *Bjorkman*, 759 S.W.2d at 588 (Stephens, C.J., dissenting).[9]

* * *

Even under a proper application of "neutral principles of law," courts must give effect to church constitutions and canons (*Jones*, 443 U.S. at 603); and this Court should at least reaffirm that directive, since several state courts have disregarded it. But we agree with petitioner that the repeated failure of some courts applying "neutral principles of law" to give effect to clear provisions embodying a hierarchical polity places that whole approach on shaky ground. The approval of "neutral principles" in *Jones v. Wolf* rests on the premise that "[t]hrough appropriate reversionary clauses and trust provisions, religious societies can specify what is to happen to church property in the event of a particular contingency." 443 U.S. at 603. The state courts of last resort have failed to give consistent assurance that this premise will

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[9] Similarly in this case, the Massachusetts Appeals Court relied heavily on testimony that other parishes had been allowed to leave the denomination and "[t]ake with them their property without claim by the Church" (Pet. App. 11a). This conclusion squarely conflicts with *Calvary Presbyterian Church, supra*, in which the Michigan Court of Appeals rejected the argument that a denomination was estopped from asserting an implied trust in church property because it earlier had permitted the local church to sell a house that had been similarly held. 148 Mich. App. 105, 384 N.W.2d at 95-96. The Petition for Certiorari (at 8 n.3) explains why such evidence is inappropriate: it employs a court's notion of "consistency" to question the validity of a religious body's beliefs, when in fact there may (as there were here) be numerous reasons, doctrinal and practical, why a higher body chooses to exercise its ultimate control over church property in one case but not in another.

be observed. Surely, if the decision in this case is allowed to stand, hierarchical churches will be at a loss to know how they can protect their rights in local church property if statements as clear as these can be disregarded by lower courts.

CONCLUSION

Amici urge that the Petition for Certiorari be granted.

Respectfully submitted,

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APPENDIX

STATEMENTS OF INTEREST

James E. Andrews, as Stated Clerk of the General Assembly of the Presbyterian Church (U.S.A.). James E. Andrews, as Stated Clerk of the General Assembly, is the senior continuing officer of the highest governing body of the Presbyterian Church (U.S.A.). The Presbyterian Church (U.S.A.) is the largest Presbyterian denomination in the United States, with approximately 2,750,000 active members in 11,500 congregations organized into 172 presbyteries under the jurisdiction of 16 synods.

The Presbyterian Church (U.S.A.) is vitally interested in protecting the free exercise of religious practice with regard to church property issues. The case law set out in this brief is indicative of the Presbyterian Church's long vigilance on this issue. As noted in this brief, the polity and decision making structure of the Presbyterian Church (U.S.A.) is an expression of the Church's deeply held religious convictions, tracing its origins to the first century Christian community. Presbyterian constitutional provisions deal with church property matters in the context of its theological understanding of the Unity of the Church.

In its constitution (the *Book of Order*), the Presbyterian Church (U.S.A.) follows exactly the same process in making decisions involving property as it does in the decisions about ordination, placement of ministers in the pulpit, and in dealing with religious doctrine. This truth was recently reaffirmed in *God Alone is Lord of the Conscience*, a Policy Statement adopted by the 200th General

Assembly of the Presbyterian Church (U.S.A.) in 1988 (at p. 17). The Assembly said: "Internal disputes within churches, including disputes over church property, should be decided by the highest ecclesiastical authority recognized by both sides before the dispute arose." The Supreme Judicial Court of Massachusetts has intruded into this ecclesiastical realm. Such confusion requires this Court's careful attention.

The **National Council of Churches of Christ in the U.S.A.** is a community of thirty-two national religious communions having an aggregate membership of around 40,000,000 in the United States. Its policies are determined by a General Board of 250 members selected by the member communions in proportion to their size and support of the Council. The Council has entered friend-of-the-court briefs in over 130 cases involving issues of ethics, morality and/or religious or civil liberty based on the policies set by the Board. The Council includes bodies of both congregational and hierarchical polity. It has long affirmed the right of its member communions – and all other religious bodies – to determine their own internal affairs as they deem best, choosing their own locus for the exercise of authority, whether local, regional, national or global, free from intervention by civil powers. That authority includes the ability to control the use of their property for the purposes of the religious body, free from alienation by judicial fiat.

The **General Conference of Seventh-day Adventists** is the highest administrative level of the Seventh-day Adventist Church, representing 7 million members worldwide. The Church joins the accompanying brief because it believes and has long taught that freedom of

conscience must include not only the right to believe but also the right to express, advocate and bear witness to belief and that governmental neutrality towards religion is in the best interest of both religion and government, and of society at large.

Christian Legal Society, founded in 1961, is a non-profit ecumenical professional association of over 4,000 Christian attorneys, judges, law students and law professors with chapters in every state and at 85 law schools. Since 1975, the Society's legal advocacy and information arm, the Center for Law and Religious Freedom, has advocated the protection of religious autonomy, speech and exercise in this Court and in state and federal courts throughout the nation.

Using a network of volunteer attorneys and law professors, the Center provides accurate information to the general public and the political branches regarding the law pertaining to religious exercise. In addition, the CLS Center has filed briefs *amici curiae* on behalf of many religious denominations and civil liberties groups in virtually every case before the U.S. Supreme Court involving church-state relations since 1980.

The Society is committed to religious liberty because the founding instrument of this nation acknowledges as a "self-evident truth" that all persons are divinely endowed with rights that no government may abridge nor any citizen waive. Declaration of Independence (1776). Among such inalienable rights are those enumerated in (but not conferred by) the First Amendment, the first and foremost of which is religious liberty. The right

sought to be upheld here inheres in all persons by virtue of its endowment by the Creator, Who is acknowledged in the Declaration. It is also a "constitutional right," but only in the sense that it is recognized in and protected by the U.S. Constitution. Because the source of religious liberty, according to our nation's charter, is the Creator, not a constitutional amendment, statute or executive order, it is not merely one of many policy interests to be weighed against others by any of the several branches of state or federal government. Rather, it is foundational to the framers' notion of human freedom. The State has no higher duty than to protect inviolate its full and free exercise. Hence, the unequivocal and non-negotiable prohibition attached to this, our First Freedom is "Congress shall make no law. . . . "

The CLS Center's national membership, two decades of experience, and professional resources enable it to speak with authority on church autonomy.

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1994

PRIMATE AND BISHOPS' SYNOD OF THE RUSSIAN ORTHODOX CHURCH OUTSIDE OF RUSSIA,

Petitioner,

v.

RUSSIAN ORTHODOX CHURCH OF THE HOLY RESURRECTION, INC., *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Judicial Court Of Massachusetts

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1. The decision below is a particularly glaring example of the doctrinal confusion rampant among the state courts dealing with the resolution of disputes among religious communities after *Jones v. Wolf*, 443 U.S. 595 (1979). The Supreme Judicial Court of Massachusetts ruled that a religious community[1] that for over nineteen

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[1] As the lower courts did, Respondents refer to the Petitioner as an "umbrella organization." Br. in Opp. 1. Whatever one makes of this case, the Russian Orthodox Church Outside of Russia [ROCOR] is most emphatically not an umbrella organization. It, of course, does not make or sell umbrellas. Even when the term "umbrella organization" is given an appropriate metaphorical resonance, the term simply does not fit. For example, the Modern Languages Association may be described as "an umbrella organization that welcomes Dickens scholars, Old Norse language buffs, Marxists and medievalists all under the same roof." Amy Wallace, "For the Sake of Humanities," *Los Angeles Times*, Dec. 27, 1994, at A12. But ROCOR is not such a convenient gathering place for a motley bunch of wildly discordant views. As the Regulations of ROCOR illustrate, Pet. App. 25a-44a, ROCOR is a *church* that strives to be in conformity with the teachings of Jesus Christ and his Apostles. Respondents prove too little and too much when they suggest that the corporate law of Massachusetts settles the constitutional issues presented in this case. Br. in Opp. 1-2. They prove too little because the corporate law of Massachusetts is governed by the prohibition against "*any* law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. Const., Am. I. They prove too much because the same corporate law may not be held to grant a benefit to one religious community that is not afforded to another. The courts may not recognize the hierarchical character of the Roman Catholic Church, *Fortin v. Roman Catholic Bishop of Worcester*, 416 Mass. 781, 625 N.E. 2d 1352 (1994), and rule – as they did here – that Russian Orthodox Christians are governed by Bishops only in respect to doctrinal matters and not with respect to control over church property. *See* the discussion of the *Fortin* case below at 7.

centuries[2] has regarded itself as historically *hierarchical*, i.e., governed by bishops, could under the law of the

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[2] Respondents suggest that the Russian Orthodox Church became established in Russia in the 10th century. Br. in Opp. 1. Normally a dating error can be ignored in the Reply at this stage. In this instance, however, the slip discloses an important difference of perspective that we feel obliged to comment upon. Perhaps Respondents wish to call the attention of this Court to the 9th century mission of Saints Cyril and Methodius to the Slavs, whose followers reached Russia in the 10th century, whence comes the Cyrillic alphabet and the conversion of millions of Russians to Christianity in 988 A.D. *See, e.g.*, "Cyril, Saint (826-69), Methodius, Saint (c. 815-85), Apostles of the Slavs," F.L. Cross and E.A. Livingstone, eds., *Oxford Dictionary of the Christian Church*, 370 (2d ed. 1974); Timothy Ware, *The Orthodox Church*, Chapter 4, The Conversion of the Slavs, 82-95 (1976). No serious historian of the Orthodox Church would, however, date the beginning of the church in a particular country from the time of the journeys when missionaries brought the Gospel to that part of the world. Thus the Orthodox Church in its various national manifestations (such as the Greek Orthodox, the Russian Orthodox, or the Serbian Orthodox) traces its true origins to the outpouring of the Holy Spirit on the Apostolic community in Jerusalem on the first Pentecost (Acts of the Apostles 2:1-11). This is not a picky or irrelevant point. On the contrary, the central legal dispute in this case – whether secular courts will allow Orthodox Christians to be governed by Bishops – corresponds to a religious belief at the very core of Orthodox Christianity. These religious communities define themselves as "Orthodox" (or "believing rightly") precisely because of their insistence that the hierarchical governing structure or polity of the church reflects religious obedience to the teaching of the Apostles. This teaching is reflected in the hierarchical role of bishops, and more particularly in the teaching of the first seven ecumenical Councils of Bishops from the First Council of Nicaea in 325 A.D. to the Second Council of Nicaea in 787 A.D.

Commonwealth be regarded as a *congregationally* controlled organization for purposes of determining what to do with the church property when a local parish decides to defect from the church. Pet. App. 2a.

This holding conflicts with decisions of this Court, Pet. 12-13, and with other appellate decisions in other State courts. Pet. 13-22. Indeed, we illustrated with several cases that the lower courts are in severe disarray over how to resolve disputes that arise within religious communities. For example, we showed that Presbyterians are treated differently on the issue of ownership of parish property after a defection from the national church, depending on whether they reside in Pennsylvania or in Maryland. *Compare Presbytery of Beaver-Butler of United Presbyterian Church v. Middlesex Presbyterian Church*, 507 Pa. 255, 489 A. 2d 1317, *cert. denied*, 474 U.S. 887 (1985), with *Babcock Memorial v. Presbytery of Baltimore*, 464 A. 2d 1008 (Md. 1983). Pet. 18-19. And we showed that Episcopalians are treated differently on the same issue depending on whether they live in Kentucky or in Michigan. *Compare Bjorkman v. Protestant Episcopal Church in the United States*, 759 S.W. 2d 583 (Ky. 1988) with *Bennison v. Sharp*, 329 N.W. 2d 466 (Mich. App. 1983). Pet. 18-21.

Respondents try to minimize this glaring conflict by the avoidance of any substantive discussion of these cases, preferring not to "detain the Court with a discussion of how *Jones* has affected the Presbyterian and Episcopalian churches." Br. in Opp. 9. The Court can get a better understanding of how *Jones* has adversely affected these churches by reading the Brief Amicus Curiae filed in support of certiorari by the Stated Clerk of the Presbyterian Church (U.S.A.) and other religious organizations,

including all of the major Orthodox Christian communions in this country.

Respondents suggest that we relied falsely upon all of the precedents of this Court involving Orthodox Christians – from *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94 (1954)[3] to *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976) – for the proposition that these cases "assume correctly that the polity of these [Orthodox] religious organizations is hierarchical." Br. in Opp. 10, citing Pet. 13. At one point in their argument they suggest that this Court's characterization of ROCOR as hierarchical in the *Kedroff* case "has no probative value in this action." Br. in Opp. 10. Two sentences later they concede that this Court "simply assumed that both ROCOR and its protagonist, the Moscow Patriarchate, were hierarchical." Id. It escapes us why *Kedroff* does not support the obvious fact that the Petitioner here is the hierarchy of a hierarchical church. The Court can easily satisfy itself on the hierarchical nature of ROCOR by referring to the Regulations of the church, Pet. App. 25a-35a, and to the Normal Parish By-Laws Adopted by the Respondent, Pet. App. 36a-44a.

At another point Respondents suggest that our reliance upon several decisions involving the Serbian Eastern Orthodox Church, including *Milivojevich*, is flawed because of differences between the governing documents of that church and of ROCOR. Br. in Opp. 12. This

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[3] Respondents erroneously suggest that this case involved ROCOR. Br. in Opp. 10. In fact *Kedroff* involved the Orthodox Church in America, a different religious community that joined the Brief Amicus Curiae in support of certiorari.

characterization completely misses the point of our reliance upon the Serbian Orthodox cases, which we cited in the Petition to illustrate that the State courts are not in agreement with one another over whether that church is truly hierarchical or not. Churches do not have to be identical in polity or even in communion with one another in order to fall within the same classification as hierarchical. Thus although Episcopalians, Mormons, Orthodox Christians, Presbyterians, and Roman Catholics are by no means identical religious communities in full communion with one another, all of them are deeply committed to a hierarchical structure of governance. Similarly, although Jews and Muslims are obviously different religious communities, as are Baptist Christians and members of the United Church of Christ, all of them are congregational in their polity.

Even if one were inclined to agree that some artful distinctions might preserve greater harmony between this case and some of the cases that we cited in the Petition, Respondents strain credulity to the limit when they deny the existence of *any* conflict between the decision below and the decisions of this Court and any other state courts of last resort. Br. in Opp. 12-13. Commentators have recognized for years the lack of coherence or unity in the approach by civil courts to the resolution of controversies among religious communities. *See, e.g.*, John H. Mansfield, *The Religion Clauses of the First Amendment and the Philosophy of the Constitution*, 72 Cal. L. Rev. 847 (1984); William Ross, *The Need for an Exclusive and Uniform Application of "Neutral Principles" in the Adjudication of Church Property Disputes*, 32 St. Louis U.L.J. (1987); and Patty Gerstenblith, *Civil Court Resolution of Property Disputes*

Among Religious Organizations, 39 Am. U. L. Rev. 513 (1990). After fifteen years of state courts decisions going every which way in this area of the law, one might reasonably expect Respondents to offer some better approach to the problem than to deny its very existence. This kind of wishful thinking by the Respondents merely escalates the meaning of the word "denial" to new psychological heights.

2. Respondents underestimate the value of this case as a vehicle for sending a clearer message to the lower courts about the need to respect the polity of religious communities. If any religious community, whether congregational or hierarchical, brings a dispute to a civil court for resolution, it is not the government's business to transform that group's polity, but to resolve the dispute without affecting that religious conviction about the governance of the community. One way of thinking of this limit on governmental power is that it is mandated by the no-establishment principle of the Religion Clause – that the government may not prefer one form of religious polity over another, subtly or overtly. Another way of thinking about it is that it is mandated by the free exercise principle of the Religion Clause – that the government may not interfere with a deeply held religious belief or practice without a correspondingly grave secular reason for doing so. On either view, as the *Amici* suggest, all of the religious communities who joined in that brief "have a strong interest in keeping the government out of affairs that are beyond its jurisdiction and literally none of its business." Br. Am. Cur. 3.

Respondents intimate that this Court is incapable of sending this message to the lower courts by means of an

opinion in this case. In their words, "By granting the Synod's petition, this Court would achieve nothing." Br. in Opp. 9. They suggest two reasons for this conclusion, neither of which is sound.

a. Respondents badly misstate the record when they suggest that this case does not afford this Court an opportunity to reflect serenely on its ruling in *Jones v. Wolf*. Br. in Opp. 6-9. The Supreme Judicial Court of Massachusetts did in fact allude to this Court's opinion in *Jones*, which the lower court cited in *Fortin v. Roman Catholic Bishop of Worcester*, 416 Mass. 781, 625 N.E. 2d 1352 (1994). Pet. App. 3a. The amazing thing about *Fortin* is that the lower court is capable of recognizing the obvious fact that the Roman Catholic Church is a hierarchically governed community, but seems unable or unwilling to do so when the Russian Orthodox Church comes before the court with an equally venerable and clear tradition of hierarchical polity. This glaring inconsistency in the treatment of religious communities by the same court is itself a reason for granting the writ, for such discrimination is prohibited under the Religion Clause. Pet. 23-30.

b. Respondents suggest that the "ony [sic] question presented to this Court is whether the Supreme Judicial Court correctly held that the trial court's findings of fact were not clearly erroneous." Br. in Opp. 9. This statement misapprehends the function of this Court, which does not sit to correct errors, but to give sound guidance in cases of national significance such as this one. This view also misstates the appropriate standard of review that governs "cases raising First Amendment issues [where] . . . an appellate court has an obligation to 'make an independent examination of the whole record' in order to make

sure that 'the judgment does not constitute a forbidden intrusion' " in an area protected by the First Amendment. *Bose Corp. v. Consumers Union*, 466 U.S. 485, 499 (1984), citing *New York Times v. Sullivan*, 376 U.S. 254, 284-286 (1964). If the lower courts had not ignored the *Bose* requirement in this case, they would have found ample evidence to ground the conclusion that state courts are prohibited under *Jones v. Wolf* "from awarding the property of an historically hierarchical church to a local congregation that unilaterally amends its bylaws to repeal its allegiance to the church in violation of the governing documents of the church." Pet. i. (first question presented).

CONCLUSION

For these reasons and for those stated in the Petition, this Court should grant the Petition for Certiorari.

Respectfully submitted,

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